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OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 86-1109, 86-1118

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT, APPELLANT.

COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF PUBLIC WELFARE, PLAINTIFF, APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT, APPELLANT.

Argued Oct. 8, 1986

Decided March 31, 1987

Before: COFFIN, BREYER and TORRUELLA, Circuit Judges.

TORRUELLA, Circuit Judge.

This is an appeal from a district court judgment reversing a Medicaid disallowance decision of the Secretary of Health and Human Services. The appeal raises both a complex jurisdictional issue and a difficult question of statutory interpretation under the Medicaid Act. For the

reasons that follow, we affirm the district court on the merits, yet vacate the monetary judgment assessed against the Secretary.

I. *Introduction*

The Medicaid program is a joint federal-state program. The states administer its day to day operation and the federal government pays part of the cost under an arrangement in which the Secretary "reimburses" the states in advance. If on audit the Secretary disallows certain expenditures as not covered by the Medicaid statute or regulations, the money paid in advance of those expenditures is withheld from subsequent advance reimbursements. The states' decisions about what service to provide, in interaction with the Secretary's disallowance decisions, determine in large part the nature and extent of the Medicaid program.

As authorized by the Medicaid Act, Massachusetts provides services to the mentally retarded in public institutions known as intermediate care facilities for the mentally retarded ("ICF/MR"). 42 U.S.C. § 1396d. Massachusetts Department of Mental Health ("DMH") and Department of Education ("DOE") personnel work together to provide these services, using a transdisciplinary approach designed, at least in part, to help the ICF/MR residents achieve some degree of independence and self-care. The mental health staff performs work pursuant to Massachusetts mental health statutes and regulations, and the education staff carries out duties pursuant to Chapter 766 of the Massachusetts St.1972, which relates to "special education."

In two audits affecting the period July 1, 1978 through June 30, 1982, the Secretary took the position that all services provided by DOE personnel and contractors are *per se* "educational" and thus excluded from Medicaid coverage under the Secretary's regulation in 42 C.F.R. § 441.13(b).

The Secretary disallowed three service costs that are in dispute here:

1. Service delivery contracts with school committees and one regional vocational school to provide services required by Chapter 766 regulations that existing state staff could not provide,
2. Contracts to perform evaluation and monitoring functions required by Chapter 766, and
3. Salaries of DOE staff who work with ICF/MR residents in accordance with the goals of the "individual educational plans" required by Chapter 766.

Massachusetts appealed the disallowances to the Grant Appeals Board (GAB) of HHS. The GAB affirmed the disallowances, ruling that they result from the Secretary's interpretation of his own regulation, which is entitled to great deference. *See* Massachusetts Department of Public Welfare, Grant Appeals Board Decision No. 438 (May 31, 1983). On appeal, the District Court reversed, noting that the Secretary determines compliance wih Medicaid regulations

> by reference to state and federal education statutes and to the Commonwealth's method of administering the services in question, *rather than to the nature of the services themselves.* This approach errs on the side of administrative convenience at the expense of compliance with the Medicaid statute . . . .

Commonwealth of Massachusetts v. Heckler, 616 F.Supp. 687, 694 (D.Mass. 1985) (emphasis supplied). The District Court ruled that Massachusetts should be reimbursed, according to the Medicaid statutory formula, for all of the service costs listed above. The Secretary appealed.

II. *Jurisdiction*

We have recently had the opportunity to consider the jurisdiction of district courts over the Secretary's Medicaid

disallowance decisions. *See Commonwealth of Massachusetts v. Departmental Grant Appeals Board,* 815 F.2d 778 (1987) ("*Grant Appeals Board*"). *Grant Appeals Board* held that the district court does not have jurisidiction to hear a Medicaid disallowance challenge that is wholly retrospective in nature, because such a challenge seeks "money damages." And under the general right of review provided by the Administrative Procedure Act, 5 U.S.C. § 702, the district courts have jurisdiction to hear only suits "seeking relief other than money damages." *See Grant Appeals Board,* at 781-783; *Wingate v. Harris,* 501 F.Supp. 58, 62 (S.D.N.Y.1980).

The disallowance decision at issue in this case, unlike that at issue in *Grant Appeals Board* however, represents an ongoing policy that has significant prospective effect. The structure of the Medicaid program (in which the Secretary "reimburses" the states in advance) makes it inevitable that disallowance decisions concern money past due. Yet the Secretary uses these decisions to implement important policies governing ongoing programs. *Grant Appeals Board* concerned the unusual situation in which the disallowance decision had no significant prospective effect; the challenge *only* concerned the money allegedly past due.

Here, in contrast, the interpretation of the Medicaid Act announced in the disallowance decision affects far more than any money past due. The special education exclusion defines the respective roles of the Commonwealth and HHS in a continuing program. The Commonwealth's complaint challenging this statutory interpretation makes this prospective effect clear. Under the heading "Requests For Relief," the Commonwealth requested that the court do the following:

> 1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth or from recovering from the Common-

> wealth the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.
>
> 2. Set aside the Board's Decision No. 438.
>
> 3. Grant such declaratory and other relief as the Court deems just.

GAB Decision No. 438 consists of not only a refusal to pay money, but also a statement of law governing the ongoing relationship between the Commonwealth and HHS. The requested injunction is not specific to the retrospective, 1978-1982 reimbursement disallowed by the Secretary. Rather, it stretches into the future, as does the legal relationship between the parties. Prospective relief is important to the Commonwealth both because the ICF/MR program is still active and because the legal issues involved have ramifications that affect other aspects of the Medicaid program. What is at stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year.

A comparison of this decision with that in *Grant Appeals Board* reveals some of the contours of the § 702 money damages exclusion. Where a grant-in-aid dispute concerns only money past due, and no statute specifically authorizes a suit in district court, the Tucker Act provides the only applicable waiver of sovereign immunity; the case must go to the Claims Court, *See Grant Appeals Board,* at 785. But, where a grant-in-aid dispute concerns a legal question that has a significant, prospective effect on the ongoing relationship between the federal agency and the affected state, the Administrative Procedure Act grants the district court jurisdiction to provide injunctive and declaratory relief. The district court may not, however, consider the claim for money past due. That claim is one for "money damages" governed by our decision in *Grant Appeals Board, supra.* While this prospective/retrospective distinction "admittedly elevates from [*sic*] over func-

tion," *Kozera v. Spirito*, 723 F.2d 1003, 1008 (1st Cir.1983), it nonetheless is required by the Administrative Procedure Act's exclusion of suits seeking money *damages*. *See State of Minnesota by Noot v. Heckler*, 718 F.2d 852, 858 (8th Cir.1983).[1]

Accordingly, the district court below had jurisdiction to review the disallowance decision of the Grant Appeals Board and to grant declaratory and injunctive relief. The district court could not, however, order the Secretary to pay the money. On remand the district court should send the case back to the Secretary for action consistent with the Medicaid Act as interpreted in this decision. Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here. *See* Wright, *Law of Federal Courts* 682 (1983) ("if an issue of fact or

[1] This approach differs from the "prime objective" approach in one significant way. *See New Mexico v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984). The prime objective approach looks at the subjective intention of the party bringing the suit and asks "what was the primary pupose in bringing this suit?" If the answer is "to obtain money," then the suit goes to the Claims Court. The aproach in this case, on the other hand, looks at the effect of the judgment sought and not the intention of the complainant, other than as that intention bears on the retrospective or prospective effect of the relief sought. In many, and perhaps most, grant in aid cases the results of the two analyses will be the same. But the retrospective/prospective analysis should prove both easier to make and more consistent than an inquiry based on the intention of the state bringing the suit. Furthermore, sovereign immunity, which is what this § 702 problem is all about, concerns the willingness of the sovereign to subject itself to suit. That willingness turns on what the suit will require the sovereign to do, rather than why the suit was brought, and we read § 702 accordingly. Judge Breyer believes that these two tests come to the same thing and that both are satisfied here.

law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent claim between the parties, whether on the same or a different claim").

III. *The Merits*

Deciding the merits of this case requires a close analysis of the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, and an examination of the basis of the Secretary's decision.

Because we are limited to granting declaratory and prospective relief, we will only consider the merits of the special education exclusion and not whether the Secretary should have reimbursed for the specific services at issue in this case.[2] The Secretary argues that a special education exclusion follows from a reasonable interpretation of his own regulation, which is itself a reasonable interpretation of the Medicaid Act, and should therefore be affirmed. We acknowledge that the Secretary's interpretation of his own regulation is entitled to great deference. *See United States v. Larionoff*, 431 U.S. 864, 872-73, 97 S.Ct. 2150, 2155-56, 53 L.Ed.2d 48 (1977). Nevertheless, the Secretary may not interpret his regulation in contravention of the enabling statute, which is what the District Court found took place in this case. Consequently, our decision will focus on statutory, rather than regulatory, interpretation. And while the Secretary's interpretation of his enabling statute is entitled to some weight in our analysis, *see*

[2] We note that even if we could reach this issue we would have no evidentiary basis for deciding whether these particular services are "medical assistance" or not. The most we could do is remand. *See Sarasota, Florida v. F.A.A.*, 799 F.2d 674, 680-81 (11th Cir. 1986). For the same reason, our declaratory relief is limited to invalidating the special education exclusion and does not extend to a declaration that the Secretary must reimburse for these services henceforth.

Miller v. Youakim, 440 U.S. 125, 144-45 n. 25, 99 S.Ct. 957, 968-69 n. 25, 59 L.Ed.2d 194 (1979), it is not entitled to the same deference as an interpretation of his own regulation. Furthermore, in a dispute between the Secretary and a state over the meaning of the Medicaid statute, our usual deference must give way somewhat to the cooperative federalism goals of the Medicaid program.

Our review stems from § 706(2)(C) of the Administrative Procedure Act which authorizes courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). In such a review we accept the facts as stated by the Secretary, as long as they are supported by substantial evidence, and decide all questions of law *de novo*. In this case the facts are not in dispute.

A. ***The Statutory Framework***

The Medicaid Act comprises Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. The Social Security Act in general, and the Medicaid title of that Act in particular, is one of the most complex statutes Congress has ever enacted. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 2640, 60 L.Ed.2d 460 (1981). Over time the Act has grown by accretion, rather than careful planning. Be that as it may, we have to make sense out of the accretions and their accompanying contradictions and silences. To that effect we are to be guided by, but not bound to, the Secretary's experience and expertise in working with the statute. We must also be responsive to "the general principle that the Social Security Act should be broadly construed, so as to carry out Congress' intent to provide medical expense coverage for all qualifying individuals." *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 103 (1st Cir.1984).

The first section of Title XIX states the broad purposes of the Medicaid Act as follows:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

42 U.S.C. § 1396. The appropriation for achieving these purposes is automatic, as is the Secretary's corresponding payment to the states for costs incurred in pursuit of these goals and in compliance with the statute. The Medicaid Act provides that "[f]rom the sums appropriated therefor, the Secretary . . . shall pay to each State . . . an amount equal to the Federal medical assistance percentage . . . of the total amount expended . . . as medical assistance." 42 U.S.C. § 1396b. If something is "medical assistance" the Secretary must pay a percentage of its costs. Thus, the determination of whether a service is medical assistance is central to the reimbursement decision.

The Act defines "medical assistance" to mean, among other things, "payment of part or all of the cost of . . . intermediate care facility services." 42 U.S.C. § 1396d(b). Accordingly, if something is an "intermediate care facility service" the Secretary must reimburse. "Intermediate care facility services" are themselves defined as follows in relevant part:

> The term "intermediate care facility services" may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if –

> (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and which meet such standards as may be prescribed by the Secretary. . . .

42 U.S.C. § 1396d(d). While this last definition is far from complete, it does make clear that, like "medical assistance" generally, intermediate care facility services include both "health" and "rehabilitative" services. And, under § 1396 "rehabilitation" includes "services to help . . . families and individuals attain or retain capability for independence or self-care." Massachusetts claims that the disputed services provided by DOE to residents of the ICF/MR's are for such rehabilitation.

B. ***The Secretary's Interpretation: The Medical/Educational Dichotomy***

The Secretary disallowed the services because they were provided by Department of Education personnel and contractors pursuant to the state special education law, Mass.St.1972 ch. 766. Under the Secretary's regulations, "intermediate care facility services" are limited to health and rehabilitation activities and not "vocational training and educational activities." *See* 42 C.F.R. § 441.13(b). The Secretary interprets this educational prohibition to extend to "special education." *See, e.g.*, Oklahoma Department of Human Services, Grant Appeals Board Decision No. 367 (Dec. 17, 1982). According to Department policy, "special education" includes all services provided as special education under a state special education statute, whether or not such services would be considered reimbursable "medical assistance" if not covered by the state statute. In other words, the Secretary defines "intermediate care facility services" and "educational activities" to be mutually exclusive categories whose boundaries are determined, in important part, by state special education law.

The Secretary offers three primary arguments in favor of his interpretation of "intermediate care facilities." First, Congress did not intend to reimburse states for any "special education" services, because those services are provided under state special education programs that qualify the states to receive Federal money under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* Second, under the Medicaid statute, 42 U.S.C. § 1396(a)(25), HHS is a payor of last resort that may not reimburse when any state agency has a statutory obligation to pay for services. And third, under 42 U.S.C. § 1302 the Secretary has discretion to interpret incompletely defined terms in the Medicaid statute; the interpretation in question is a reasonable one that is consistent and longstanding and, as such, is entitled to great deference. We will treat each of these arguments in turn.

1. ***The Education for All Handicapped Children Act***

The Education for All Handicapped Children Act (EHCA), 20 U.S.C. § 1401 *et seq.*, set up a federal funding mechanism for state-provided special education and related services. The Secretary claims that by setting up this mechanism in 1975, Congress meant to preclude any funding for special education services under the 1971 intermediate care facility services amendment to the Medicaid Act. The Secretary argues, essentially, that because Congress specifically funded special education services under the EHCA, it did not intend to fund any special education services under the more general terms of the pre-existing Medicaid statute.

The EHCA provides grants for some special education costs to states that set up an acceptable special education program. *See* 20 U.S.C. § 1412. The special education services at issue in this case include some services which Massachusetts is required to provide as "special education" in order to receive EHCA grants and some services which

go beyond the EHCA minimum. *See* 34 C.F.R. §§ 300.13, 300.14; Massachusetts Department of Public Welfare, Grant Appeals Board Decision No. 438, slip op. at 14-15 (May 31, 1983). None of the service costs at issue have been paid for by EHCA or other federal funds.

The Secretary's argument applies only to the EHCA minimum services. If applied to services above the EHCA minimum it would directly contravene the intent of the EHCA: providing free special education and related services to all handicapped children. Removing from Medicaid coverage any service which a state voluntarily provided to all children free of charge, without any resulting federal benefit, would discourage states from providing such a service and penalize EHCA beneficiaries who are not eligible for Medicaid.

With regard to the EHCA minimum services, the chief problem with the Secretary's argument is the timing of the enactment of the two statutes. The EHCA was enacted four years after the intermediate care facility services amendment. The EHCA manifests no intent to cut back on the scope of reimbursable intermediate care facility services. In fact, the legislative history of the EHCA states:

> Any funds available from the Federal government are *clearly in addition to funds provided under this act* and are available to states to assist them in carrying out their responsibilities under State laws, state constitutions, and the U.S. Constitution.

1975 U.S.Code, Cong. Admin. News 1425, 1447 (emphasis supplied). Accordingly, we find that the EHCA did not modify the Medicaid Act to prohibit funding of special education services.

2. *Medicaid as Payor of Last Resort*

The concept of payor of last resort in the Medicaid program comes from the Medicaid Act's requirement that the

state administering agency "ascertain the legal liabilities of third parties to pay for care and services (available under the [Medicaid] plan)" and refuse to provide that care or service, or, where the agency has already provided care, "seek reimbursement for such assistance to the extent of legal liability." 42 U.S.C. § 1396a(a)(25). The Secretary argues that the Massachusetts Department of Education is a "third party" with an independent obligation under state law (ch. 766) to pay for the services in question here and that, therefore, DOE's costs in providing the services cannot be borne by the Medicaid program.

This third party liability argument is a variation on the EHCA theme outlined in the previous section. Prior to the EHCA even the Secretary would admit that DOE had no third party liability. And because Congress clearly intended that the EHCA not divest states of existing funding sources, a state statute enacted to obtain EHCA funding should not be read to create a third party liability that divests a state of any Medicaid funding.

Independent of the EHCA theme and variation, the third party liability arguments fails because the DOE chapter 766 program is not a "third party" to the Department of Public Welfare, the state agency that administers the Medicaid program in Massachusetts. Both agencies, along with the DMH, are subdivisions of the Commonwealth of Massachusetts, which brought them into being to serve complementary social welfare goals. That they even appear to be "third party" to one another is an artifact of the Commonwealth's internal organization. Were Massachusetts to reorganize and create one "super agency" to take over the functions of all three departments, the Medicaid and special education programs would not change, yet the Secretary's third party argument would disappear. This Medicaid reimbursement decision should not turn on how a state subdivides its social welfare functions and authority.

3. *Agency Discretion to Interpret the Medicaid Statute*

The Medicaid Act authorizes the Secretary to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of" the Medicaid program. 42 U.S.C. § 1302. This provision gives the Secretary authority to make reasonable regulations such as the general educational exclusion regulation in 42 C.F.R. § 441.13(b). As the Secretary argues, and we acknowledge, the education regulation is a reasonable interpretation of the Medicaid Act's limitation of funding under § 1396 to "medical assistance" and "rehabilitation and other services to help . . . individuals attain or retain capability for indepedence of [*sic*] self-care."

The Secretary argues further that he is entitled to great deference in interpreting such a reasonable regulation and that, therefore, his special education exclusion should be upheld. As we stated earlier, the Secretary does have considerable latitude to interpret his own regulation without interference from the courts. But, that latitude does not extend to an interpretation that contravenes the statute that the regulation is supposed to implement. In this case, the blanket special education exclusion violates the Medicaid Act because it excludes from reimbursement services which the Medicaid Act requires the Secretary to reimburse.

This case illustrates a problem that can result from an interpretive regulation that requires an agency to make an inquiry that the enabling statute does not mention. Here, the education regulation requires the Secretary to determine whether a given service is educational; but the Medicaid Act refers only to medical assistance. Making an inquiry into whether a particular service is "educational" does seem to be a fair way to decide whether, on the whole, it is medical assistance. What most people think of as education (what the district court below referred to as

"traditional academic education") is not "medical assistance" under Medicaid. But the reasonableness of this inquiry depends on the meaning the Secretary gives to the word "education." If the concept of "education" is expanded to include, for example, teaching a severely retarded child to control the rate at which he is fed so that he does not get food into his lungs (one of the "special education" services at issue in this case), then the exclusion goes beyond statutory authority. According to chapter 766, such a service is special education. But, as the District Court found upon review of specific evidence, this service is also a "health or rehabilitative service" covered by § 1396d(d). *See Commonwealth of Mass. v. Heckler*, 616 F.Supp. at 692-93. It is thus reimbursable "medical assistance."

As the Secretary acknowledges, the concepts embodied in the terms "education" and "medical assistance" overlap. When they do, it is simply wrong to find that the concept "education," which comes from the regulations, controls over the concept "medical assistance," which is contained in the statute. Yet this error exactly describes the Secretary's position, as a recent Grant Appeals Board decision in a similar case makes clear. *See* Pennsylvania Department of Public Welfare, Decision No. 777 (August 20, 1986). In that case, the Board stated baldly "the relevant question concerning the nature of the services is whether the services are educational, since [federal reimbursement] is prohibited in such services *whether or not they are also within the scope of Title XIX*." *Id.* at p. 17 (emphasis supplied). The Secretary would have us turn the statute on its head, an invitation which we decline. The relevant question raised by the statute is whether the services are "medical assistance," which, as we have now stated repeatedly, includes ICF/MR "services to help . . . individuals attain or retain capabilities for independence or self care." 42 U.S.C. § 1396. Accordingly, the Secretary

may not determine whether a service is included in the Medicaid program by sole reference to a state' special education law. The Secretary must make an inquiry into the *nature of the services*, not just into what they are called or who provides them.

III. ***Conclusion***

In summary, we conclude that, while the district court lacked jurisdiction to order the Secretary to release the funds withheld because of the disallowance decision, the court properly determined that the special education exclusion exceeded statutory authority and vacated the decision of the Grant Appeals Board. Nevertheless, we cannot rule that the services in question here are reimbursable "medical assistance" because we have no evidentiary basis for doing so. All we can do is order the Secretary to develop a Medicaid audit procedure that looks behind the state statutory label "special education" to determine whether services are reimbursable.

Accordingly, so much of the district court's decision that constitutes a declaratory judgment that the Secretary's blanket special education exclusion is in excess of statutory authority is *affirmed*. The money judgment against the Secretary is *vacated*.

Affirmed in part, vacated in part and remanded for action consistent with this opinion. Each party to bear its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER ET AL., DEFENDANTS.

Aug. 27, 1985

MEMORANDUM AND ORDERS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

GARRITY, District Judge.

In this action, the Commonwealth of Massachusetts ("Commonwealth") seeks review of a May 31, 1983 decision of the Department Grant Appeals Board ("the Board") of the Health Care Financing Administration ("HCFA") of the Department of Health and Human Services ("HHS"), which held that certain services provided to persons residing in state-owned intermediate care facilities for the mentally retarded ("ICF/MRs") were not eligible for reimbursement under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. ("the Medicaid program"). The Board disallowed $6,414,964 in federal financial participation ("FFP") advanced to the Commonwealth between July 1, 1978 and December 31, 1980, claiming that those costs were incurred by the Commonwealth in providing educational services and were therefore not reimbursable under the Medicaid program. The Common-

wealth contests this decision, claiming that the services in question are reimbursable under Medicaid. Jurisdiction is based on 28 U.S.C. § 1331. The parties have filed cross-motions for summary judgment. After hearing oral argument and considering the briefs and administrative record,[1] the court grants the Commonwealth's motion for summary judgment and denies defendant's motion.

I. *Relevant Statutory and Regulatory Background*

The Medicaid program, created in 1965, is designed to assist states in providing "(1) medical assistance on behalf of families with dependent children and of aged, blind, and disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396. Under the Medicaid program, such services are financed in part by federal grants to participating states which have submitted, and had approved by the Secretary of HHS, state plans for medical assistance. *Id.* The federal government pays a certain percentage of the total cost of Medicaid services, and the balance is paid by the state. 42 U.S.C. § 1396b(a).[2]

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[1] Included in the administrative record ("A.R.") is a video tape exhibit submitted by the Commonwealth which depicts the services provided to a sample of individuals who reside in Belchertown State Hospital, an ICF/MR. The court viewed the entire video tape, which is forty-five minutes in length, in chambers, having borrowed a television and video cassette recorder from the Probation Office of the court.

[2] Federal Medicaid grants are awarded to each participating state prospectively, based on an estimate provided by the state each quarter year. 42 U.S.C. § 1396b(d). Following each quarter, the state submits a report of its actual expenditures and the next quarter's grant is adjusted accordingly. The HCFA reviews state reports of expenditures and may disallow FFP when it determines that an expenditure is not reimbursable under the Medicaid program. Administrative review of a disallowance is available in the form of a request for reconsideration by the Board. 42 U.S.C. § 1316(d). Decisions of the Board are then reviewable in a United States District Court.

In 1971, Congress included in the Medicaid program "intermediate care facility services." 42 U.S.C. § 1396d(a)(15). An ICF is defined as

> an institution which is (1) licensed under state law to provide, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and service (above the level of room and board) which can be made available to them only through institutional facilities, (2) meets such standards prescribed by the Secretary as he finds appropriate for the proper provision of such care, and (3) meets such standards of safety and sanitation as are established under regulation of the Secretary in addition to those applicable to nursing facilities under State law. . . .

42 U.S.C. § 1396d(c). 42 U.S.C. § 1396d(d) provides the following:

> (d) Intermediate care facility services
>
> The term "intermediate care facility services" may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if–
>
> (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded in-

dividuals and which meet such standards as may be prescribed by the Secretary;

(2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this subchapter is receiving active treatment under such a program; and

(3) the State or political subdivision responsible for the operation of such institution has agreed that the non-Federal expenditures in any calendar quarter prior to January 1, 1975, with respect to services furnished to patients in such institution (or distinct part thereof) in the State will not, because of payments made under this subchapter, be reduced below the average amount expended for such services in such institution in the four quarters immediately preceding the quarter in which the State in which such institution is located elected to make such services available under its plan approved under this subchapter.

Under the Social Security Act, the Secretary of HHS is authorized to promulgate rules and regulations, not inconsistent with the Act, as are necessary to the efficient administration of her functions under the Act. 42 U.S.C. § 1302. Pursuant to this authority, the Secretary promulgated 42 C.F.R. § 441.13(b), which provides the following:

> Payments to institutions for the mentally retarded or persons with related conditions and to psychiatric facilities or programs providing inpatient psychiatric services to individuals under age 21 may not include reimbursement for vocational training and educational activities.

II. *State Background*

The Commonwealth has participated in the Medicaid program since 1966. The Massachusetts Department of Public Welfare is responsible for administering the

Massachusetts plan. The Massachusetts Department of Mental Health ("DMH") operates the state-owned ICF/MRs certified to participate in the Medicaid program. As an ICF/MR operator, the DMH is responsible for complying with the statutory and regulatory requirements of ICF/MRs under the Medicaid program. In particular, the DMH must ensure that all mentally retarded individuals residing in ICF/MRs are receiving active treatment, in accordance with 42 U.S.C. § 1396d(d)(2). Under the Secretary's regulations, "active treatment" requires among other things that these individuals regularly participate in "professionally developed and supervised activities, experiences or therapies" and that each individual receive an "individual written plan of care", known as an "ISP" (Individual Service Plan), which sets forth measurable goals or objectives and an integrated program of activities or therapies designed to achieve those goals. 45 C.F.R. § 435.1009. According to the regulation, "[t]he overall purpose of the plan is to help the individual function at the greatest physical, intellectual, social, or vocational level he can presently or potentially achieve." 42 C.F.R. § 435.1009(b).

Pursuant to state law, the Commonwealth is also required to provide special education to all school age children with special needs in Massachusetts. Chapter 766 of the Acts of 1972, M.G.L. c. 71B ("Chapter 766"). Special education is defined as "everything which is required to be provided to a child in need of special education pursuant to the IEP." Chapter 766 Regulations, 122.0. The IEP (Individual Education Plan), which is prepared for each Massachusetts child with special needs, describes the child's educational abilities and goals and sets forth methodologies and teaching approaches designed to meet these goals. *See* Chapter 766 Regulations, § 322.0.

Section 12 of Chapter 766 requires that the Department of Education ("DOE") establish and maintain a school department for school-age children in each ICF/MR and provide services jointly with the DMH. M.G.L. c. 71B, § 12. The director and staff of such school departments are employees of the DOE, which is responsible for the costs of all aspects of the educational programs in the ICF/MRs. *Id.* The Bureau of Institutional Schools ("BIS") of the Division of Special Education of the DOE is responsible for administering the educational programs at ICF/MRs, pursuant to Chapter 766. Chapter 766 Regulations, § 700.0.

The Commonwealth, in an effort to comply with both state and federal law concerning the treatment of the mentally retarded at ICF/MRs and to promote efficiency, has consolidated the administration of the services provided by the DMH pursuant to the "active treatment" requirement of Medicaid and the services provided by the BIS pursuant to Chapter 766. Each individual residing in an ICF/MR who is required to have an annual ISP developed in accordance with the Medicaid regulations and an annual IEP developed in accordance with Chapter 766, is evaluated annually through a "Joint Review Process", in which DMH and BIS staff develop a joint plan meeting the requirements of federal and state law. The DMH then delegates the services required in each individual's plan to the appropriate professional groups. The Commonwealth also utilizes a "Transdisciplinary Approach" in its staffing. This approach encourages "role release" by different professionals, or the sharing of one's expertise with others of different professions, in order to consolidate the staff and to ensure continuity and consistency in the delivery of services to these individuals.

Concerned that in providing the services to individuals at ICF/MRs there would be difficulty distinguishing between payments for services which are reimbursable under

the Medicaid program and those which are not, the Commonwealth sought clarification from the regional Medicaid office of HHS and received an interpretative bulletin, Action Transmittal HCFA-AT-78-104 ("the Action Transmittal") in response (attached as Appendix 1). The Action Transmittal, dated November 29, 1978, was issued by HHS in an effort to clarify the relationship between the Medicaid program and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 *et seq.* ("EAHCA") with respect to services provided to individuals residing at ICF/MRs. Briefly, EAHCA requires that in order to qualify for federal education assistance under the statute, the state must assure all handicapped children the right to a free appropriate public education. 20 U.S.C. § 1412(1).[3] Free appropriate public education consists of "special education" and "related services". 20 U.S.C. § 1401(18). The term spcial education is defined as

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.

20 U.S.C. § 1401(16). The term related services is defined as

> transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical counseling services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handi-

[3] Chapter 766, which was enacted three years before the federal statute, provides such assurance in Massachusetts.

capped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17). EACHA [*sic*] allows for federal funding for related services in they are provided by the state to individuals free of charge. 34 C.F.R. § 300.14(a)(2)

The Action Transmittal acknowledges that in providing services to individuals at ICF/MRs, "it is difficult to clearly differentiate between a habilitative . . . and an educational service." In a letter accompanying the transmittal, an attorney for HCFA states that while academic education (reading, writing, etc.) and vocational training are not eligible for FFP under the Medicaid program, "training in 'the activities of daily living' (such as dressing and feeding oneself) are both required and reimbursable under Title XIX." However, according to the Action Transmittal, some services may constitute both habilitative services under Medicaid and related services under EACHA [*sic*]. Therefore, it states that these habilitative services may be reimbursable under Medicaid even though they are also considered to be related services in an individual's IEP. Furthermore, states may develop "consolidated" IEPs and ISPs for individuals whose Medicaid and educational services overlap. However, the transmittal also states that "[i]f [the] state statute extends responsibility for payment of specific health services to the education agency, then the Medicaid Agency cannot pay for those services." Finally, the Action Transmittal explained that the purpose of 42 C.F.R. § 441.13 in excluding education and vocational activities from Medicaid coverage was "to assure non-duplication of federal funds."[4]

[4] Defendants now reject non-duplication of funding as the purpose behind the regulation.

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The Commonwealth determined that all of the services rendered by the DMH and BIS to individuals at the ICF/MRs were eligible for reimbursement under Title XIX. The Secretary, however, disallowed all costs incurred by the BIS in providing services at ICF/MRs as non-reimbursable education services. Specifically, the following BIS costs were disallowed:

1. Activities funded under Title I of the Elementary and Secondary Education Act, P.L. 89-10;[5]
2. Service delivery contracts with educational collaboratives and one regional vocational school entered into by the BIS to provide specific services required by Chapter 766 regulations which could not be provided by existing state personnel;
3. Contracts for personnel to perform evaluation and monitoring functions required by Chapter 766; and
4. State-salaried personnel of the Department of Education, including institution school teachers and instructional aides, who, as required by Chapter 766, service ICF/MR residents in accordance with documented goals stated in IEPs.

III. *Findings and Conclusions*[6]

We hold that the services provided by the BIS in ICF/MRs are eligible for reimbursement under the Medi-

[5] Prior to the issuance of the HCFA disallowance notice, the Commonwealth agreed to reduce from its claim for reimbursement those costs for which it had received reimbursement already under Title I. According to defendants these costs amounted to $67,800, of which the federal share was $35,090. Therefore the disallowance in category 1 above is not disputed by the Commonwealth.

[6] This case presents questions of both fact and law. Findings of fact of the Board are reviewable by this court under the "substantial evidence" standard. *State of Minnesota v. Heckler*, 8 Cir. 1983, 718 F.2d 852, 860. Questions of law are to be resolved by the court. *Id.*

caid program. The types of services provided by the BIS to these mentally retarded individuals fall clearly within the category of habilitative services explicitly covered by Title XIX. 42 U.S.C. § 1396.

In making this decision, the court relies to a great extent on the video tape described in footnote 1 *ante* and on the case study of Client "B" described in the Commonwealth's memorandum in support of its motion for summary judgment. Client "B" is profoundly retarded, as well as severely physically handicapped. Because B has extreme difficulty in interacting with his environment, i.e., he is virtually unable to respond to visual or auditory activity, his ISP and IEP goals as of 1980 largely involved the stimulation of B's senses to increase his awareness of his surroundings. B's curriculum at his day program, which was located outside his ICF/MR and was staffed by the BIS, included learning to signal for food when he was ready to eat to prevent aspiration of food into his lungs by controlling the speed at which he was fed; attending auditory stimulation for two minutes; locating hidden objects; showing preference for certain objects presented; and encouraging social interactions with adults.[7]

The video tape depicts nine Belchertown State School residents performing various exercise under the supervision of BIS staff.[8] For example, these exercises include training different individuals to respond to visual stimuli, to turn on a radio with an adaptive switch, to remember the letters in one's name, to ask for a drink by reaching out with a cup, to eat with a spoon, and to sort out objects.

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[7] The Secretary suggests that Client "B" is not representative of the individuals who receive services from the BIS because he was the most severely handicapped of all the individuals whose cases were audited by HHS. However, she does not dispute the fact that she disallowed the service provided to B as "educational", a position we find untenable.

[8] The court was aided in understanding these exercises by the testimony of Linda Brown before the Board on March 17, 1983 (A.R. 1278-1315).

We hold that these services, which we believe are representative of the services generally provided by BIS staff, are covered by the Medicaid program.

The purpose of Medicaid is to provide medical assistance to eligible individuals *as well as* "rehabilitation and other services to help . . . such individuals attain . . . capability for independence or self-care." 42 U.S.C. § 1396. Medicaid coverage is not limited to purely medical assistance, but was " 'designed to alleviate the cost of health care which is active and remedial rather than custodial in nature.' " *State of Minnesota v. Heckler*, 8 Cir.1983, 718 F.2d 852, 864 (citing *Legion v. Richardson*, S.D.N.Y., 354 F.Supp. 456, 459, *aff'd sub nom. Legion v. Weinberger*, 414 U.S. 1058, 94 S.Ct. 564, 38 L.Ed.2d 465 (1973)).

ICF/MRs were included in the Medicaid program in 1971 for that same purpose, viz., to provide "health or rehabilitative services for mentally retarded individuals." 42 U.S.C. § 1396d(d)(1). By this amendment to the Medicaid statute, Congress sought to remove the mentally retarded from mental hospitals and skilled nursing homes, where the services are largely custodial, to institutions in which the primary objective is the provision of health and rehabilitative services to enable these individuals to achieve some degree of self-care. *See* Report of Senate Finance Committee printed in Statement of Sen. Long, 117 Cong.Rec. 44721 (1971). As stated by Senator Bellman:

> Mental retardation is not, in most instances, a condition which responds to treatment. However, there are public institutions whose primary objective is the active provision of rehabilitative, educational and training services to enhance the capacity of mentally retarded individuals to care for themselves or to engage in employment. Public institutions whose primary objective is the provision of health services or

> rehabilitative services to the mentally retarded should be subject to Federal participation under adequate safeguards.

117 Cong.Rec. 44720 (1971). Therefore, within the Medicaid statute and its legislative history we find clear Congressional intent to provide Medicaid coverage for the types of habilitative services provided by the BIS.[9]

The Board concurred in the decision of HHS that these BIS costs were incurred for "educational activities" within the meaning of 42 C.F.R. § 441.13(b). The basis for this decision is essentially that these services were provided by the Commonwealth pursuant to Chapter 766 through the DOE in accordance with each individual's IEP.

Regulations section 441.13(b) is consistent with the purpose of the Medicaid program. Medicaid was not designed to cover traditional educational services;[10] rather, as stated *ante*, its purpose is to provide those treatments, therapies, and other programs necessary to enable disabled individuals to gain some degree of independence in performing "the activities of daily living." In our opinion,

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[9] We do not agree with the Commonwealth that all services provided pursuant to the "active treatment" requirement of 42 U.S.C. § 1396d(d)(2) and 42 C.F.R. § 435.1009 are reimbursable under Medicaid. The active treatment language of the statute demands that residents at ICF/MRs participate in regular programs and therapies. The purpose of this requirement is to avoid coverage for purely custodial services. In our opinion, active treatment is a condition placed on ICF/MRs under the Medicaid statute. However, we find that the "health and rehabilitative services" language of § 1396d(d)(2) describes the types of services covered by the Medicaid program.

[10] Federal education assistance is provided to the states through Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10; the Elementary and Secondary Education Amendments of 1969, P.L. 91-230; and the Education for All Handicapped Children Act of 1975, P.L. 94-142.

section 441.13(b) was inappropriately applied in this case. In particular HHS defined "education" by reference to state and federal education statutes and to the Commonwealth's method of administering the services in question, rather than to the nature of the services themselves. This approach errs on the side of administrative convenience at the expense of compliance with the Medicaid statute in our view.

Section 441.13(b) does not define "educational activities." The services provided by the BIS, involving for the most part therapies designed to train the mentally retarded to function at some minimal level in society, cannot be defined as "traditional" or "academic" education, which clearly would be excluded under the regulation. Yet these Medicaid covered services could perhaps be described as "special education" or "related services" as defined by Chapter 766 or EACHA [*sic*]. *See Abrahamson v. Hershman,* 1 Cir.1983, 701 F.2d 223, 228. On that basis, HHS would have them excluded from Medicaid coverage under section 441.13(b).

However, section 441.13 does not state that the costs of all services which are provided pursuant to a state education statute and paid for by the state are not reimbursable under the Medicaid program; rather, it states only that the costs of "educational activities" are not reimbursable. The Massachusetts and federal education statutes define special education extremely broadly. *See Abrahamson, supra*. But the fact that these services might be classified as "education", "special education" or "related services" under other statutes, particularly a state statute, is not dispositive of the classification of these services for the purposes of the Medicaid statute nor the regulations promulgated thereunder. "[A] word used in one statute does not necessarily have the same meaning in another statute." *Complaint of Tracey,* D.Mass.1985, 608 F.Supp. 263, 268. Education is normally more narrowly defined. It

connotes a more traditional, academic discipline. All training or instruction is not education in our view. The simple skills being taught to the individuals at these institutions, particularly those shown on the videotape and being taught to Client "B", are certainly not educational in the traditional sense of the word.[11]

Furthermore the court has found *ante* that these services are covered by the Medicaid program because they are habilitative in nature.[12] Section 441.13(b) may not be used by HHS to take out of the coverage of Medicaid those services explicitly covered by the statute. Therefore, we reject the position of HHS that Medicaid coverage is not available for services covered by state education statutes.

The fact that these services are provided by an agency of the Commonwealth's education department does not bar their classification as Medicaid covered habilitative services. As explained by the Commonwealth, each individual in an ICF/MR is evaluated annually by DMH and BIS staff together and is given a joint plan of care, which includes his or her ISP and IEP. In fact, many of the services required under these individuals' ISPs and IEPs are similar or identical, which is understandable in light of 45 C.F.R. § 435.1009, which states that the overall purpose of the ISP is to help the individual function "at the greatest physical, intellectual, social, or vocational level he can presently or potentially achieve." Under its Transdis-

[11] The Commonwealth claims that the services in question do not constitute "education" because they do not aid these individuals in progressing from one "cognitive" level to another (Commonwealth's brief, p. 37). That analysis may be a more technical way to characterize what we have described in lay terms.

[12] We agree with the Commonwealth that many of the services described in the videotape and in the Commonwealth's brief seem to be designed to aid these individuals in overcoming their health-related disabilities and therefore could be categorized as health services.

ciplinary Approach, the programs and therapies required by these plans are provided by both DMH and BIS staff in an integrated fashion. This technique employed by the Commonwealth was specifically endorsed by HHS in its Action Transmittal. Given this Transdisciplinary Approach, HHS's decision to disallow all services provided by the BIS pursuant to IEPs, while allowing similar services provided by the DMH pursuant to ISPs, is arbitrary in our opinion and is also not supported by substantial evidence.

Finally, we find that the Commonwealth was justified in seeking FFP for the costs incurred by the BIS under categories 2, 3 and 4 listed on pages nine of this opinion. All of the costs listed in these categories were expended by the Commonwealth in administering the programs and providing the services to ICF/MR residents which we have held are covered by the Medicaid program.

Conclusion

The Commonwealth is entitled to FFP under the Medicaid program for the costs incurred by the BIS at ICF/MRs. Therefore, the Commonwealth's motion for summary judgment is granted and defendants' cross-motion for summary judgment is denied.[13]

[13] Counsel shall endeavor to stipulate and file a form of judgment consistent herewith as soon as practicable.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

JUDGMENT

For the reasons set forth in this Court's August 27, 1985 Memorandum and Order, it is hereby ordered and adjudged that the decision of the Department Grant Appeals Board of the United States Department of Health and Human Services in Decision No. 438 (May 31, 1983) which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U.S.C. §§ 1396 *et seq.*, is reversed.

Dated this 7th day of October, 1985.

By the Court,

/s/ W. ARTHUR GARRITY, JR.
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

November 25, 1985

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

GARRITY, J.

This action has been filed as a related case, as it presents the same legal and factual questions as those at issue in *Commonwealth of Massachusetts v. Heckler et al.*, Civil Action No. 83-2523-G. The court entered its memorandum and orders on cross-motions for summary judgment in that case on August 27, 1985. On the following day, the court entered an order in the instant action directing defendants to file any opposition, with an explanatory memorandum, to the same result in this case. Defendants' response to the court's order proposed that the case be decided on cross-motions for summary judgment based on the briefs filed in the 1983 case and on the administrative record in this case. As grounds for this procedure, defendants cited the similarity of the two cases and the fact that the court's reasoning in the 1983 case would seem to apply equally here. The court adopted the procedure suggested by defendants which resulted in the cross-motions for

summary judgment which are now before this court. After consideration of the briefs and the administrative record, the court grants plaintiff's motion for summary judgment and denies defendants' motion.

Defendants concede that the factual and legal issues in the instant action are "substantially identical" to those already litigated in the 1983 case and ruled on by this court. In the court's opinion, the only differences between the two cases are the time period during which the Commonwealth provided the services at issue and the amount of federal financial participation which the Commonwealth asserts it is entitled to under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. § 1396 *et seq*. While the court afforded defendants an opportunity to persuade the court that its ruling in the 1983 case should not govern the present action, neither defendants' response to the the August 28, 1985, order nor its present motion and supporting papers explain why a result different from that reached in the 1983 case is warranted here.

In this action, the Commonwealth seeks review of a March 29, 1985 decision of the Department Grant Appeals Board of the Health Care Financing Administration of the Department of Health and Human Services. The Board disallowed $4,908,994 in federal financial participation advanced to the Commonwealth from January 1, 1981 to June 30, 1982 on the ground that those costs were incurred in providing educational services and were therefore not reimbursable under the Medicaid progam. However, the Board stated in its decision that the activities provided by the Commonwealth of Massachusetts from January 1, 1981 through June 30, 1982 are indistinguishable from previously disallowed activities provided by the Department of Education from July 1978 through December 1980. Those previously disallowed activities were found by the court to be the types of services that fall clearly within

the category of habilitative services explicitly covered by Title XIX. 42 U.S.C. § 1396. Furthermore, the Board disallowed the present claim on substantially the same grounds as the previous claim at issue in the 1983 case. Thus, the reasons for the court's decision in the 1983 case holding that the services at issue there were eligible for reimbursement under the Medicaid program, apply with equal force to the essentially identical factual and legal questions at issue in the instant action.

In granting plaintiff's motion for summary judgment and denying defendants' motion, the court relies on the findings of fact and conclusions of law in its order of August 27, 1983 in the related case of *Commonwealth of Massachusetts v. Heckler et al.*, Civil Action No. 83-2523-G. Defendants have failed to make any showing that the instant action is distinguishable from the 1983 case on either factual or legal grounds. The briefs on which the parties rely and the administrative record compel the conclusion that there are no genuine issues of material fact and that plaintiff is entitled to a judgment as a matter of law.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

MARGARET HECKLER, DEFENDANT

JUDGMENT

GARRITY, J.

In accordance with the court's "Memorandum and Order on Cross-Motions for Summary Judgment" filed on November 25, 1985, it is ORDERED:

that summary judgment for plaintiff against defendant be, and it is hereby, entered.

By the Court:

/s/ STEPHEN A. MOYNAHAN, JR.
Stephen A. Moynahan, Jr.
Deputy Clerk

Dated: December 2, 1985

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

November 8, 1983

PROCEDURAL ORDER

GARRITY, J.

In the above-entitled action, defendant filed an answer to the complaint on October 28, 1983 asserting several affirmative defenses. The court will treat the second defense (lack of subject matter jurisdiction) and third defense (failure to state a claim upon which relief can be granted) as constructive motions to dismiss. Defendant shall file by Monday, December 5, 1983, a memorandum of law in support of its constructive motions. Plaintiffs shall reply by Monday, December 19, 1983. If materials outside the pleadings are submitted, the court will consider the motions under Fed. R. Civ. P. 12(b) and 56.

/s/ GARRITY J.
United States District Judge

ORDER

1/11/84

In light of parties' memoranda, both defenses are ordered denied. In our opinion, we do have subject matter jurisdiction. Denial of the third defense is without prejudice to later motions for summary judgment.

/s/ GARRITY, J.

APPENDIX G

DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENTAL GRANT APPEALS BOARD

SUBJECT: Massachusetts Department of Public Welfare
Docket No. 84-199
Decision No. 638

DATE: March 29, 1985

DECISION

The Massachusetts Department of Public Welfare appealed a determination by the Health Care Financing Administration (HCFA or Agency) disallowing $4,908,994 in federal financial participation (FFP) claimed under title XIX (Medicaid) of the Social Security Act. The disallowed costs were for day school programs provided by the State Department of Education to residents of eight State-owned intermediate care facilities for the mentally retarded (ICF/MRs). The activities were provided from January 1, 1981 through June 30, 1982 and are indistinguishable from previously disallowed activities provided by the Department of Education from July, 1978 through December, 1980. State's brief, pp. 15, 32-33; Agency's brief, p. 2. The Board upheld the disallowance of the earlier activities in Decision No. 438, Massachusetts Department of Public Welfare, May 31, 1983.[1]

The Agency disallowed the present claim on the same grounds as the earlier one, concluding that program regulations preclude reimbursement since they expressly

[1] Board Decision No. 438 is currently under review in the U.S. District Court for the District of Massachusetts. D. Mass. No. 83-2523-G.

bar payment for "vocational training and educational activities" for individuals in ICF/MRs. 42 CFR 441.13(b). The Agency also cited a policy action transmittal implementing the regulation, HCFA Action Transmittal 78-104 (AT-78-104) dated November 29, 1978. The Agency concluded that descriptions of educational activities and contrasting descriptions of reimbursable activities in the transmittal further supported its position.

For the reasons discussed below and in our previous decision, we agree with the Agency that costs of the school programs may not be reimbursed under the Medicaid program. Accordingly, we uphold the disallowance.

The State in its brief identified four issues presented by this appeal.[2] We summarize those issues as follows:

1) Whether 42 CFR 441.13(b) bars reimbursement only of educational activities that have already been reimbursed under federal education programs for the handicapped;

2) Whether the activities at issue are reimbursable under standards set out in AT-78-104;

3) Whether the activities are reimbursable if they constitute "active treatment" as defined by the Medicaid program; and

4) Whether the State's good faith reliance on applicable portions of AT-78-104 precludes the disallowance of these costs.

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[2] The State raised several additional issues in its earlier appeal. Since those arguments were previously unavailing to the State, and the State did not even raise them here, we do not address them. We note, however, that, in order to clarify the nature of services and the factual basis of the case, the State did "incorporate by reference" the entire administrative record in Board Decision No. 438, including a videotape, which we do consider in reaching our decision here.

1. *The Regulation*

Medicaid regulations expressly prohibit any payment under the program to institutions for the mentally retarded for "vocational training and education activities." 42 CFR 441.13(b). We conclude and, indeed, the State did not even deny that the activities in question come within the plain or common sense meaning of the term "educational activities" for residents of institutions for the mentally retarded. The activities consisted of day school programs staffed by special education teachers and provided to school age residents of the ICF/MRs by the State Department of Education. Many of the activities were even provided outside the institutions in educational collaboratives or in other settings. All of the activities are specifically required under Massachusetts law and regulations relating to educating children with special needs. (State law requirements are discussed in greater detail on pages 7-8 below.)

The only argument the State made based on the regulation itself is that the bar on payment precluded funding only for activities that had already been reimbursed from some other federal source. In other words, the State here seems to be arguing that the regulation does not bar funding generally but permits the State to select which federal program would be more advantageous to it in funding the activities. The fundamental difficulty with this argument is that there is nothing in the language of the regulation to support the position and indeed the State does not even point to language that allegedly might. The State instead refers to the fact that it has returned to the Agency $404,305 of FFP in Medicaid for activities that were already reimbursed under another federal program. The State, however, can not use its repayment, an action fully within its control, as an authority for limiting the scope and effect of a reimbursement rule in the regulations.

Moreover, as we indicated in Decision No. 438, even if there were no funding bar in the regulations, it is questionable whether there is authority in the Medicaid statute for the general reimbursement of educational activities in ICF/MRs. Medicaid is designed specifically to provide medical, not educational, assistance. See section 1901 of the Act. The statute itself does not provide any authority for funding educational activities as such. On the other hand, the Congress has enacted other federal statutes to provide federal assistance for educational programs for the mentally retarded administered by state educational agencies. *See* statutes cited on page 7 of Decision No. 438.

The absence of any direct reference to funding for "educational activities" in the Medicaid statute, therefore, is evidence of the lack of Congressional intent to fund the activities. Indeed, the general bar on funding of educational activities has been in program regulations well before the activities in question were provided and has never been overridden by Congress through statutory amendment.[3]

Finally, while the Agency in AT-78-104 (see section 2 below) discussed the purpose of the regulatory bar in terms of assuring "non-duplication of federal funds," Appendix B, p. 2, the action transmittal at no point implied, as the State here would argue, that "educational" activities could be reimbursed under Medicaid simply if the State had not claimed and received funding for those activities under any other federal program. The Agency could "assure non-duplication" either by prohibiting funding for activities actually funded through another federal program, or by prohibiting funding for "special education"

[3] In decision No. 438 (pages 9-11) and in Oklahoma Department of Human Services, Decision No. 367, December 17, 1982 (pages 5-9), we considered other issues of legislative intent which also supported the conclusion that barring funding for educational activities is consistent with Congressional intent.

activities potentially covered by another program. The regulation takes the latter approach.

We would also note that the Agency has identified other purposes for the bar on funding for educational activities. In discussing an earlier version of the same regulatory bar on funding for educational activities, the predecessor to the Agency stated that the activities were not "medical care cost (services) as defined under title XIX and are assumed to be financed by other Federal agencies or to be a traditional service of the State for all appropriate population groups." Medical Services Administration Program Regulation Guide No. 33 (PRG-33), September 30, 1974, Question 7, p. 4.

Accordingly, we conclude that the regulatory bar on funding applies to the activities in question and precludes reimbursement for them under the Medicaid program.

2. *HCFA Action Transmittal 78-104*

On November 29, 1978 the Agency released an action transmittal (AT-78-104) which discussed the relationship between recently enacted education laws and rules concerning educational and habilitative activities in the Medicaid program. The State here argued that AT-78-104 permitted reimbursement of special education or related services under the Medicaid program as habilitative activities. The State did not argue that all of the activities here were outside the definition of educational activities under the action transmittal criteria. Nevertheless, it implied that all should be reimbursed because the action transmittal recognized flexibility in funding certain habilitative activities and because, even if the activities were educational, they still might fall within the conceptual umbrella of the statutory term "active treatment."

In Decision No. 438 (pages 13-16) and in Decision No. 367 (pages 9-18), we discussed at length the effect of AT-78-104 on the regulatory funding bar for educational

activities. Although AT-78-104 contains language about providing flexibility to states in deciding what funding sources apply, that language is used within the limited context of services which are reimbursable as habilitative under Medicaid (in accordance with 42 CFR Part 442, Subpart G) and also qualify as "related services" under the Education for All Handicapped Children Act and the implementing regulations. It is within this very limited context that certain funding choices may be made. However, the action transmittal also indicates that even these limited choices may not exist where related services are provided by the State educational agency free of charge to all children as part of "special education." *See,* 45 CFR 121a.14(a)(2) now recodified as 34 CFR 300.14(a)(2). Ultimately, then, the action transmittal distinguishes between services that may clearly be identified as a Medicaid habilitative responsibility (fundable) or an educational responsibility (nonfundable) *and* "related" activities that because of their nature may be reimbursed under other programs or Medicaid "*depending on careful assessment of Federal requirements and State and local factors.*" (Emphasis supplied) AT-78-104, p. 6.

In giving an example of an activity that usually falls in the purely educational category, the action transmittal cites "educational services provided in a traditional classroom setting by trained special educators." *Id.* First and foremost, the State here has not demonstrated that any of the services at issue fall outside the scope of this example. Many of the services are provided in educational collaboratives or other settings outside the institutions. The remaining services are still provided within some form of school program setting within the institution.

The record here, including a videotape prepared by the State for its earlier appeal, demonstrates that the programs were designed to take into account the needs of children within a broad range of abilities. However, the

fact that the programs were designed to be responsive to particular learning needs of individuals, or the fact that the programs may not resemble methods of education for nonhandicapped children is not a basis for concluding the activities are not educational activities. This term must be interpreted in the context of a regulation addressing activities for retarded persons requiring institutionalization. Moreover, in using the adjective "traditional," we think the Agency was attempting to convey something of the scale, scope, and source of the program. We do not think that the Agency was attempting to bar activities solely because they might use a particular educational methodology. In sum, then, we think that the action transmittal's characterization of educational activities fully supports the Agency's position that the claim here would not be reimbursable.[4]

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[4] The State also cited an Agency interpretation of educational activities based on an earlier version of the educational activities regulation in a program regulation guide. This interpretation referred to educational activities as "formalized classroom programs." MSA-PRG-33, September 30, 1974, question 8. Although the State admittedly had not relied on this interpretation since it only recently came to its attention, the State identified the interpretation as a more contemporaneous one to the underlying rule than the action transmittal's. Clearly, however, based on all the evidence in the record in this appeal, the activities in question are part of a "formalized" classroom setting. The discussion above fully demonstrates this. Moreover, as the Agency argued, the program guide uses the terms "formalized classroom setting" to contrast educational activities with toilet training, feeding, dressing etc. provided to patients by the staff of the institution *or* with camps or farms maintained by the facility for recreation or physical rehabilitation. Here there is no allegation of the latter and the Agency has allowed costs of training and services in activities of daily living provided by the ICF/MR staff (State Department of Mental Health). Moreover, AT-78-104 explains in greater detail the effect of later-enacted "special education" programs on the "educational activities" regulation and, to the extent it conflicts with MSA-PRG-33 (which it here does not), it can be said to supersede it.

Moreover, as we discussed in detail in Decision No. 438 (pages 13-16), Massachusetts statutory and regulatory standards extend responsibility for "related services" to the State education agency as part of its definition of "special education." Thus, even for those limited services where flexibility might exist under the Agency action transmittal, State statute and regulations preclude the exercise of discretion here.[5] The Board's conclusions concerning State law in Decision No. 438 were based on the plain meaning of the State statute and regulations. The same statute and regulations have remained in effect for the period of the current disallowance.[6] Although the State made two

[5] In discussing what its law provided, Massachusetts completely misconstrues the Agency's reference to the action transmittal standard in the disallowance and the Board's interpretation of AT-78-104 in Decision No. 438. The State implied that the proper standard under the action transmittal was whether State statute and regulations require the State to bear the "sole financial responsibility" for the services—presumably to the exclusion of any federal source including Medicaid and education programs. There is no basis whatsoever in the language of the action transmittal for such a standard, however, nor is there any basis in the Medicaid statute or regulations. Further, the program purpose of such a standard would be very difficult to decipher. The State here did not clarify why a regulatory bar for funding of educational activities under Medicaid should go into effect only where the State had already expressly assumed sole financial responsibility for the activities. Finally, although the action transmittal states that Medicaid funding is precluded "[i]f State statute extends responsibility for payment of specific health services to the education agency" or for "health or supportive services available without charge to all children," we do not need to reach the issue here of whether this creates a rule excluding Medicaid funding even in some circumstances where no federal funding elsewhere is potentially available. Here, all of the services are clearly *special education* under State standards, and thus apparently would be fundable under federal education programs.

[6] The Massachusetts law, commonly referred to as "Chapter 766," provides under section I:

> In light of the policy of the Commonwealth to provide an adequate publicly-supported education to every child resident

arguments to refute the Board's conclusions, neither was based on interpretations of the actual language of the State law and regulations for the period in question. The State instead cited a series of cases (State's brief, pp. 25-26) which it argued supported the position that the State was not the sole financial source for special education activities. These cases, however, are irrelevant to the actual issue raised. They do not address the reimbursement of special education activities under Medicaid and indeed do not focus specifically on the one activity that is potentially reimbursable, related services. If anything, the relevance of these (and cases cited on pages 19-20 of the State's Brief) to the issue here is that they buttress the point that special education is indeed an educational activity by emphasizing that handicapped children have *educational* needs which must be met.

The State also argued that Massachusetts has amended its special education statute to relieve local school committees of the obligation for health care services that are reimbursable by third parties. Mass. G.L. Ch. 71B § 5. This amendment also is irrelevant to this case for several reasons. First, it was not enacted until after the period for which this disallowance was taken. Second, it affects the obligations of the local school committees and does not purport to alter the responsibility of the Department of Education for institutionalized handicapped individuals.

> therein, it is the purpose of this act to provide for a flexible and uniform system of special education program opportunities for all children requiring special education. . . .
> Mass. G.L. Ch. 71B.

Massachusetts Department of Education's Chapter 766 regulations (603 CMR 122) define special education as "everything which is required to be provided to a child in need of special education pursuant to the IEP (Individualized Education Plan] for such child." The activities at issue here are precisely those activities which are provided pursuant to the child's IEP.

Third, it alters responsibilities only for health care services. The Agency did not take a disallowance for any health care services which were provided in the ICF/MR setting by Department of Mental Health doctors, nurses, therapists, and mental health personnel and which would clearly fall within any definition of health care. Agency brief, pp. 5, 9. The State did not show that any of the activities in question here would be encompassed by its amended provision.

Accordingly, we conclude that the activities here fall within the category of educational activities described in the action transmittal. Even if some of the activities might have qualified as "related" services where some flexibility for Medicaid funding might exist under AT-78-104, no funding would be available here since Massachusetts statutes and regulations make such activities part of "special education" for Massachusetts children.

3. *The Active Treatment Requirement*

The State argued as its primary position in the instant appeal that program "active treatment" requirements make all of the subject activities fundable in spite of the regulatory bar.

In defining what type of facility is an ICF for purposes of determining whether the facility provides "covered services" for particular patients, the Medicaid statute includes public institutions for the mentally retarded, if among other things:

> (1) the primary purpose of such institution . . . is to provide health or rehabilitative services for mentally retarded individuals and which meet such standards as may be prescribed by the Secretary;
> (2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this title is receiving active treatment under such a program. . . . Section 1905(d) of the Act.

Program regulations require as part of "active treatment":

> [a]n individual written plan of care that sets forth measurable goals or objectives stated in terms of desirable behavior and that prescribes an integrated program of activities, experiences or therapies necessary for the individual to reach those goals or objectives. The overall purpose of the plan is to help the individual function at the greatest physical, intellectual, social or vocational level he can presently or potentially achieve. 42 CFR 435.1009(b).

Without providing a comprehensive subject-matter breakdown of the activities for all of the children involved[7], the State argued that the activities here have as their "primary objectives the stimulation of sensorimotor capabilities and the encouragement of developmental growth." State's brief, p. 22. The State suggested that the activities were structured around a normal school day and that many of the activities were provided in collaboratives or locations away from ICF/MRs because the activities responded to "normalization," the attempt to make the environment of the retarded individual as close to normal as possible. Finally, the State argued that the Agency recognized this functional overlap of active treatment services by permitting a single consolidated plan to enable the State to meet the active treatment requirement.

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[7] Although the State incorporated into the record a videotape providing a limited description of services or activities for a selected group of residents, it never provided the Board with a precise subject-matter breakdown of all of the activities for all the individuals concerned for the period of the disallowance.

The State here completely misconstrues the effect of the active treatment requirement.[8] This provision allows public facilities that otherwise would be outside of the definition of an ICF (and thus unable to have patients for whom services could be reimbursed under the program) to qualify as an ICF for given patients if the facilities provide "active treatment" for those patients according to an individualized plan. The provision, however, in no way guarantees that *every* activity or service that the facility might include in an active treatment plan for a given patient is reimbursable. This is purely a threshhold requirement that must be met before any type of otherwise reimbursable service can be reimbursed. If any activity or service is precluded from reimbursement to begin with, e.g, educational or vocational activities, those services therefore still can not be reimbursed even if included in an individualized plan. Services included in the plan may be non-reimbursable for any number of reasons, not merely because they might be educational or vocational. To the extent that AT-78-104 provides flexibility in consolidating plans to meet the active treatment requirement, it never indicates that consolidation can make a non-reimbursable service reimbursable or that special education activities can be reimbursed if used to meet a facility's active treatment requirement.[9]

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[8] The Board discussed the active treatment requirement at length in Connecticut Department of Income Maintenance, Decision No. 562, August 17, 1984, pp. 1-18. The issue raised there, however, was whether a facility was actually providing active treatment for residents of certain cottages, not whether the State was entitled to funding for educational activities used by a facility to meet the active treatment requirement.

[9] The Agency here noted that the State meets the active treatment requirement in the case of adult residents of ICF/MRs without resort to the subject special education programs provided to children under State education laws. Agency's brief, p. 7. The Agency also noted that active treatment services for children are reimbursed under the program, e.g., the costs of training and services in activities of daily living provided the staff of the institutions (State Department of Mental Health). *Id.* at 5.

The action transmittal identified one type of activity, "related" services, that may be reimbursed under the Medicaid program in spite of any similarity or relationship to educational activities. As we discussed previously, however, none of the activities here qualify for reimbursement under criteria identified by AT-78-104. We also note that the State's argument ignores the fact that if there was no overlap between ICF/MR services and educational activities, there would be no need for the regulation.

Accordingly, we conclude that the activities in question are barred from reimbursement under the regulations and may not be funded even if used to meet active treatment requirements under the program.

4. *Reliance*

The State's final argument was that the costs here were allowable because the State in good faith relied on applicable portions of AT-78-104 and that such reliance should "preclude the Secretary from subsequently disclaiming [those] portions." State's brief, pp. 30-32. The obvious difficulty with this argument is that the action transmittal does *not* support the State's position and consequently is not being disclaimed by the Agency here. The transmittal nowhere implies that services or activities that qualify as "educational" activities are reimbursable under Medicaid. Indeed, as we stated above, the example given by the transmittal of what is an "educational service" fully supports the conclusion that the activities at issue here are "educational." To the extent that the activities might have qualified as "related services," the transmittal also indicates that Medicaid funds may not be used even for

"related services" if State standards make those services part of "special education." The plain meaning of State statute and regulations is that they do.

Conclusion

On the basis of the foregoing reasons, we uphold in full the disallowance of $4,908,994.

Judith A. Ballard

Norval D. (John) Settle

Donald F. Garrett
Presiding Board Member

APPENDIX H

DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENTAL GRANT APPEALS BOARD

SUBJECT: Massachusetts Department of Public Welfare
Docket No. 82-169
Decision No. 438

DATE: May 31, 1983

DECISION

The Massachusetts Department of Public Welfare appealed a decision by the Health Care Financing Administration (Agency) disallowing $6,414,964 in federal financial participation (FFP) claimed under title XIX (Medicaid) of the Social Security Act. The bases for the disallowance were that (1) the State had incorrectly claimed reimbursement for the cost of vocational training and educational activities provided to residents of intermediate care facilities for the mentally retarded (ICFs/MR); and (2) the costs also were not allowable because the activities are available free of charge to all children under Massachusetts State law.

For the reasons stated below, we sustain the disallowance.[1]

[1] The record in this appeal consists of the parties' briefs and appeal files, documents submitted by the State prior to the hearing in this matter, the transcript of the hearing, exhibits submitted by the parties during the hearing, and the parties' post-hearing submissions. One of the exhibits submitted by the State was a video tape depicting the services currently provided by the Bureau of Institutional Schools (BIS) to residents of the public ICFs/MR. The video tape was shown during the hearing with the Presiding Board Member present. The other panel members viewed the video tape in Washington, D.C.

I. *Background*

In Massachusetts, Medicaid payments for ICF/MR services are based on prospective per diem rates. The rate paid to each ICF/MR in any given rate year is based on the facility's operating costs for a year two years prior to the rate year plus an inflation factor. The Massachusetts Rate Setting Commission (RC) audits the costs-of-operation reports submitted by the Department of Mental Health (DMH), the State Agency responsible for operating the State-owned ICFs/MR, for the eight ICFs/MR and calculates the per diem rates used under the Medicaid program. Appellant's Appeal File, Tab B, p. 1.

The HHS auditors' review of the RSC audits supporting the fiscal year 1981 per diem rates disclosed that the RSC did not audit $21 million in costs that were added on to the ICFs/MR cost-of-operation reports. The HHS auditors determined that $9.6 million of these "added on" costs related to educational services provided to ICF/MR patients under the age of 22 in state owned or supported institutions by the Department of Education, Division of Special Education, Bureau of Institutional Schools (BIS). The HHS auditors also examined rate years 1979 and 1980 and found that the per diem rates for ICFs/MR for all three years reflected about $30 million in educational costs. The auditors concluded that this resulted in $12,482,898 in Medicaid overcharges ($6,450,054 FFP) because Medicaid reimbursement for educational costs is prohibited by federal regulation.[2] Appellant's Appeal File, Tab B, pp. 3-4.

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[2] Of the $6,450,054 FFP in Medicaid overcharges, the auditors found $35,090 FFP involved Title I expenditures under the Elementary and Secondary Education Act for which the State had already been reimbursed. The State has, however, returned this amount to HCFA and this cost was excluded from the disallowance. Appellant's Appeal File, Tab A, p. 3.

The auditors determined that the BIS costs consisted of the following:

1)	Activities under Title I of the Elementary and Secondary Education Act (Pub. L. 89-313)	8%
2)	Services delivery contracts, the contract vendors being educational collaboratives (school committees or local boards of education, formally joined to meet Massachusetts statute and regulations Chapter 766 special education requirements) and one regional vocational school.	68%
3)	Contracts to evaluate and monitor functions as required by Chapter 766.	11%
4)	State-salaried personnel of the Department of Education, including institution school teachers and institution aides.	13%

Appellant's Appeal File, Tab B, p. 10.

In determining the disallowance amount, the auditors recalculated the per diem rates for all eight ICFs/MR, excluding the reported BIS costs. This calculation resulted in a decrease in the per diem rates. The disallowance amount was calculated by multiplying the decreased per diem rates by the number of Medicaid patient days claimed for the facilities during the period from July 1, 1978 to December 31, 1980 and then applying the federal medical assistance percentage used to determine the federal share. This amount was then deducted from the amount actually claimed by the State to arrive at the disallowed amount.[3]

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[3] The State argued in its brief that the audit report and disallowance letter did not adequately explain how the amount of the disallowance was determined. The State, in its brief, requested the Agency to supply the State with the methodology used to recalculate Medicaid per diem rates. State's Brief, p. 54. At the hearing, the State asked the Agency to explain exactly how the actual amount of the disallowance was arrived at. Transcript, Vol. I, p. 68. The parties agreed to meet after the hearing to work out the exact calculations, and to submit them to the

HCFA, in its disallowance letter, concurred with the auditors' findings that educational costs are not reimbursable under Medicaid. HCFA cited 42 CFR 441.13(b) in support, which provides:

> Payments to institutions for the mentally retarded or persons with related conditions . . . may not include reimbursement for vocational training and educational activities.

Appellant's Appeal File, Tab A.

HCFA also cited Action Transmittal 78-104 which provides:

> . . . if State statute extends responsibility for payment of health services to the education agency, then the Medicaid agency cannot pay for these services . . . .

HCFA noted that Massachuttes law on educating children with special needs, commonly referred to as Chapter 766, under section I provides:

> In light of the policy of the commonwealth to provide an adequate publicly-supported education to every child resident therein, it is the purpose of this act to provide for a flexible and uniform system of special education program opportunities for all children requiring special education, ...

HCFA then cited the Massachusetts Department of Education's Chapter 766 regulations at Chapter 1, Section 122.0, which defines special education as:

Board. Transcript, Vol. I, p. 98. The Board has not received any such submission. However, the record indicates that the HHS auditors met with the State on August 5, 1981, after the draft audit report was issued to the State. During that meeting, the auditors explained how they calculated the disallowance and supplied the State with a copy of the auditors' calculation worksheet. Agency's Appeal File, Tab 2. Therefore, we believe that the State had been fully informed as to how the amount of the disallowance was calculated.

> . . . everything which is required to be provided to a child in need of special education pursuant to the IEP [Individualized Education Plan] for such child.

HCFA also concluded that "State law and regulations extend the responsibility for payment of all related services [support services as are required to assist a handicapped child to benefit from special education] including health services identified under an individual's IEP, to the State's educational agency." Appellant's Appeal File, Tab A.

II. *Summary of Decision*

The State contended that the services provided by BIS are part of an active treatment program required by section 1905(d) of the Social Security Act and specifically intended by Congress to be reimbursable under that section. The State contended, therefore, that the provisions of 42 CFR 440.13(b) which bar reimbursement for educational activities necessarily conflict with the regulations implementing section 1905(d) found at 42 CFR 442, Subpart G and 42 CFR 435.1009. The State also argued that at the very least the purpose of 42 CFR 441.13(b) was merely to prevent a state from claiming federal funds under two or more different programs.

The Agency argued that Medicaid is a statutory program designed to provide medical assistance and was never meant to encompass educational services. The Agency further asserted that provision of "special education" is the responsibility of the state education establishment and for this reason as well would not be reimbursable under Medicaid. According to the Agency, the only possibility for Medicaid reimbursement would be for "related services" as defined in the federal education regulations at 45 CFR 121a.13(a), now 34 CFR 300.13(a). The Agency, however, contended that potential funding for Medicaid

reimbursement for "related services" is not at issue here because the State education statute provides that "special education" will include all related services, and therefore, Medicaid funding is not available for "related services" either. The Agency also argued that even if the Board were to find that "related services" (the Agency pointed out that examples of such services would be medical services, occupational therapy, physically therapy, habilitative activities and psychological services) were not included within the State's definition of "special education," that in this case such services were provided by trained and licensed DMH staff and were not part of the costs disallowed. The Agency explained that for the period in question, BIS costs were not incurred for these services since the BIS staff consisted only of teachers and administrative and clerical staff.

Several of the issues raised by this dispute are identical or similar to those the Board considered in Oklahoma Department of Human Services, Decision No. 367, December 17, 1982. In *Oklahoma*, the Board noted that states receiving federal education funds are required to provide to the handicapped (including the mentally retarded) a free appropriate public education, which means "special education" and "related services," which are defined in federal education program regulations. The Board determined that "special education" costs may not be charged to Medicaid, finding that "special education" is an educational activity within the meaning of 42 CFR 441.13(b) as interpreted in the Agency's Action Transmittal 78-104. The Board, however, noted that if a cost is for a "related service" as defined in the education regulations, and such service is otherwise reimbursable under Medicaid, it may be funded under Medicaid unless such service is made the responsibility of the State education agency by state statute.

Although the State disagreed with the Board's *Oklahoma* decision, *supra*, and asked that we reconsider that decision, we believe that *Oklahoma* was correctly decided. We conclude, therefore, on the basis of the *Oklahoma* decision and the analysis set forth below, that the BIS costs are "special education" costs and therefore, an "educational activity" within 42 CFR 441.13(b).

III. Whether the services provided by BIS are the type of service Congress intended to reimburse under section 1905(d) of the Social Security Act.

a. The regulation denying Medicaid funds for "educational activities" is consistent with the statute.

Under Title XIX of the Social Security Act (Act), "medical assistance" to needy individuals may include payment for intermediate care facility services. Section 1905(a)(15) of the Act. The term "intermediate care facilities services" is defined so that it may include "services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions" if certain requirements are met. Section 1905(d). Medicaid funding is available only if the institution's primary purpose is "to provide health or rehabilitative services for mentally retarded individuals," the institution meets standards prescribed by the Secretary of Health and Human Services, the mentally retarded individual for whom Medicaid payments are made is receiving "active treatment," and the state claiming Medicaid funds has agreed to maintain non-federal expenditures for services to ICF/MR patients. Subsections 1905(d)(1), (2), and (3).

Medicaid is a statutory program to provide funds for medical assistance. The statute itself never refers to educational activities. We agree with the Agency that even without the provision contained in 42 CFR 441.13(b), payments for educational activities or vocational training generally would be unauthorized under Title XIX.

We cannot assume or infer that educational services are covered under Medicaid for persons in an institution for the mentally retarded in the absence of a clear Congressional mandate for such coverage. The absence of any direct or indirect reference to such coverage in the Medicaid statue is evidence of the lack of Congressional intent to cover such services. The fact that Congress has enacted other federal statutes to provide federal assistance for educational programs for the mentally retarded conducted by the state educational establishment is further evidence that Congress had no intention of funding these programs under Medicaid. *See*, Pub. L. 89-313, known as Title I of Elementary and Secondary Education Act of 1965; Pub. L. 91-230, known as the Elementary and Secondary Education Amendments of 1970; and Pub. L. 94-142, known as the "Education for All Handicapped Children Act of 1975."

The active treatment requirement imposed as a condition for funding under Title XIX, but not defined therein, does not remedy the lack of authority for Medicaid coverage of educational services. The definition of active treatment in 42 CFR 435.1009 can be seen as a description of what should be provided individuals in an ICF/MR. This regulation defines active treatment as requiring, among other things, an individual plan of care, the overall purpose of which is "to help the individual function at the greatest physical, intellectual, social or vocational level." The definition, however, does not purport to list specific services which will be funded by Medicaid. The State is interpreting the reference to "intellectual" in the regulatory definition as requiring Medicaid to provide funding for all education services.

This is not so. The regulatory description merely provides that, for ICF/MR services to be reimbursable, the individual must be receiving treatment which will aid intellectual functioning. As we indicate in *Oklahoma*, Agency regulations on ICF/MR standards do require qualifying

institutions to provide services which aid in the "intellectual development" of the mentally retarded, as part of "training and habilitation services." 42 CFR Part 442, Subpart G. However, these regulations must be read in conjunction with section 441.13(b), which specifically limits payments for covered services by providing that costs of "educational activities" may not be reimbursed.

The State has argued in its briefs and in the evidence presented that the services provided by BIS are not educational activities but training and habilitation services required to be provided by ICFs/MR. The State, in its video tape presentation, showed the types of services presently provided to ICF/MR residents under the age of 22. The State would have us believe that because the services provided were not traditional educational activities, the prohibition in 441.13(b) is not applicable.

At the outset we note that traditional education, as we know it, is not possible for many of the mentally retarded individuals the State identified as being residents of the facilities at issue here. Accordingly, in looking at the regulation barring reimbursement for educational activities *to institutions for the mentally retarded* we cannot agree that the regulation intended to prohibit merely traditional educational activities. The limitation clearly encompasses the appropriate type of education which would be given to the mentally retarded. Thus, even though we agree with the State that the services depicted in the video tape would not generally be considered traditional educational activities, we nevertheless believe that these services are representative of special educational services required to be provided, as individual need dictates, to school age children under State and federal education statutes and regulations.

An ICF/MR is required by 42 CFR 442.463 to provide "training and habilitative" services intended to aid the intellectual, sensorimotor, and emotional development of a

resident. The Agency did not disallow for any services the State's Department of Mental Health provided under the requirement of 42 CFR 442.463. To the extent that the services provided by BIS are similar to those contemplated by that regulation, those services nevertheless enable BIS to carry out its mandate for providing special education. This is especially true where the costs disallowed here specifically relate to the provision of services mandated by both federal education law and state education law to be provided to school age children. The Agency correctly pointed out that the DMH staff carried out the Medicaid requirements whereas the BIS staff carried out the requirements of the special education law. Where a possibility for overlap between training and habilitation services and special education may exist, we believe that the Agency reasonably drew the line as to what is reimbursable by recognizing what functions the DMH and BIS staffs are required to carry out on a daily basis. In this case, under the Education For All Handicapped Children Act and its predecessor acts cited above, as well as under Massachusetts State Law, Chapter 766, the State is mandated to provide special education programs designed to meet the mentally retarded individual's needs. BIS, not DMH, is the state educational agency responsible for fulfilling the special education mandate at the public ICFs/MR.

Therefore, we conclude that 42 CFR 441.13(b) is consistent with the Medicaid statute.

b. The regulation denying Medicaid funds for "educational activities," is consistent with legislative intent.

The State disagreed with the Board's finding in *Oklahoma*, that 42 CFR 441.13(b) properly interprets Congressional intent. The State took exception to the Board's characterization of Senator Bellmon's remarks at the time the 1971 amendments were introduced. *See, Oklahoma, supra*, p. 5.

We determined that Senator Bellmon's remarks, which we will not repeat here (*see, Oklahoma, supra*, at 5), were "vague at best and certainly cannot be read as support for a conclusion that Congress was requiring funding of all such [educational] activities under Medicaid." We concluded in *Oklahoma* that Senator Bellmon's reference to "educational activities" was part of his description of the types of institutions which exist. We still agree with that characterization. Further, the fact that Senator Bellmon chose to omit "educational activities" from his later description of public institutions which should be funded by Medicaid would not allow us to read into that description "educational services" where that language is not included in the statute or prior legislative history. Finally, we conclude that Senator Bellmon's remarks go to the question of what type of institutions will qualify for Medicaid funding, as opposed to describing the costs in which the federal government will participate.

Further, as we stated in *Oklahoma*, our conclusion that the regulatory prohibition on Medicaid funding for educational activities is consistent with Congressional intent is supported by other considerations. The first is that ICF/MR services are an exception to the general Medicaid rule that services in public institutions (other than medical institutions) are not to be reimbursed. *See*, section 1905(a) of the Act. The second is that Congress specifically expressed in section 1905(d)(3) an intent to enhance services to ICF/MR residents through Medicaid funding and not to replace funding from non-federal sources. Finally, we have already noted that Congress has specifically provided, in other legislation, federal funding for educational services to residents of state institutions. *See*, Pub. L. 89-313 and Pub. L. 94-142. Therefore, there is ample reason to interpret the restriction in 441.13(b) by consid-

ering whether the activities are normally the local government's responsibility and are potentially reimbursable from other federal programs.

The State also disagreed with our finding that 42 CFR 441.13(b) is a long-standing interpretation of Congressional intent and that the legislative history does not indicate a Congressional intent which is inconsistent with the regulation.

The State argued that "Congress intended to improve the condition of the mentally retarded by requiring active treatment, not the warehousing of people, before the federal government would reimburse ICF's for the care of the mentally retarded through the Medicaid program." Appellant's Post-hearing Brief, p. 5. This statement merely reinforces what the Board has already concluded in *Oklahoma*—that in order to receive Medicaid funding, an institution must meet certain requirements, such as providing "active treatment." This statement does not describe the costs in which the federal government will participate. The "active treatment" requirement is a recognition of the concept that institutionalized mentally retarded individuals must be involved in different types of programs and therapies and not just left alone and forgotten. To the extent that 42 CFR 442, Subpart G may implement that concept by listing services that are required to be provided in ICFs/MR, it must be read with the limitation contained in 42 CFR 441.13(b).

The State cited *Connecticut v. Schweiker,* 557 F. Supp. 1077 (D. Conn. 1983) in which the court found that a long-standing agency interpretation does not deserve deference where the issue of statutory construction involves not technical details but the statute's broad purpose. The State alleged that 441.13(b) purports to interpret the Medicaid statute's broad purpose and therefore no deference need be given to the regulation based on its alleged longevity. The fact, however, that an agency promulgates an interpretation and Congress does not act to change it, in spite of having the opportunity, implies that the administrative interpretation is consistent with legislative intent. Regardless of whether 42 CFR 441.13(b) is viewed as interpreting the statute's broad purpose, we believe that it is fully consistent with the statutory framework and legislative intent. The purpose of that regulation as stated in 42 CFR 441.1 is to set forth "limits on FFP for specific services defined in part 440." The regulation implements the basic design of Title XIX of covering medical assistance, not educational activities.

We also cannot agree with the State's assertion that prior to the Oklahoma disallowance there was no indication that the Agency interpreted 42 CFR 441.13(b) to exclude from reimbursement the type of services provided by BIS. On the contrary, the State has not presented any evidence that the Agency has interpreted this regulation in any other way. Furthermore, the State has not convincingly demonstrated why the regulation is not clear on its face as barring reimbursement for the activities in question. Therefore, we cannot accept the State's argument that legislative inaction should not infer approval, where Congress has had ample opportunity to react to the regulatory prohibition by way of subsequent amendment even after the Oklahoma disallowance was taken, and has chosen not to do so.

Therefore, we conclude that there is ample evidence of Congressional intent to support the Agency's regulation.

c. The regulation does not merely preclude duplicate funding.

The State argued that 42 CFR 441.13(b) merely prohibits a State from claiming under Title XIX for services for which the State also received payment under Title I or other federal statutes. The State contended this was HCFA's interpretation as expressed in Action Transmittal HCFA-AT-78-104, dated November 29, 1978. The State

argued, however, that in this case HCFA is interpreting the regulation to mean more than avoidance of duplication of federal grants. The State also contended that the regulation at 42 CFR 441.13(b) conflicts with the Education for All Handicapped Children Act, unless the regulation is interpreted only as preventing double payments. The State argued that because of this conflict, the Action Transmittal is an attempt to reconcile the differences.

We do not agree that 42 CFR 441.13(b) serves only to prevent duplication of federal funds. As we stated in *Oklahoma*, the plain language of this regulation is that it prohibits Medicaid participation in any "educational" activity, whether or not other federal funds have already been paid for that activity. We also do not agree that the State's interpretation is necessary to avoid conflict between the Medicaid statute and the Education for All Handicapped Children Act. As we discussed above, the statutory purpose of Medicaid is the provision of medical assistance. There is no language in the statute providing Medicaid funding for educational activities. Moreover, we have not found any legislative intent requiring the Secretary to fund "educational activities" under Medicaid. Furthermore, we cannot assume or infer Medicaid reimbursement for such activities in the absence of any such legislative intent, particularly when Congress has enacted other laws dealing with special education. Therefore, we do not find any conflict between Medicaid and the Education for All Handicapped Children Act.

If the purpose of the regulation was merely to ensure that federal matching under Medicaid would not extend to services reimbursed by federal education funds, the Agency could have done so explicitly by prohibiting Medicaid funding for services actually funded through the federal educational program. However, section 441.13(b) prohibits funding for any activities potentially covered by another program. This not only prevents duplication of

federal funding but also prevents Medicaid funding for educational activities which are not reimbursable under education statutes.

We also question the validity of the State's argument that prior to the Education for All Handicapped Children Act, most *medically* handicapped children did not have any other financial help to get an education, whereas individuals residing in ICFs/MR were eligible to participate in an active treatment program. This argument overlooks the fact that States received federal education funds for physically handicapped as well as mentally retarded children in state operated and state supported schools for the purpose of special education programs under Pub. L. 89-313. Furthermore, the State here is equating "education" with "active treatment program" and using these terms interchangeably, whereas, in fact, under Pub. L. 89-313, the same federal education funds would be used to provide special education to a mentally-retarded individual residing at an ICF/MR as a physically handicapped child attending a State operated or supported school. The State's analogy here between the physically handicapped and the mentally retarded only reinforces our position that the mentally retarded individual, like the physically handicapped, is not entitled to receive Medicaid funding for that person's special educational needs.

Therefore, we conclude that the State's interpretation of 42 CFR 441.13(b) is not supported by the plain meaning of the regulation or by statutory intent.

d. The distinction between "special education" and "related services" in the Action Transmittal is consistent with the statute and regulations.

One of the bases for the Agency's disallowance here was that the State, under its state standards, must provide all services, including "related services," free of charge to children in need of special education. The State however argued that state standards may not reasonably be used to

determine which services are included in "special education." The State further argued that the Board's distinction between "special education" and "related services" in *Oklahoma* in interpreting 42 CFR 441.13(b) is unsupportable because these concepts did not become part of federal education law until almost two years after 42 CFR 441.13(b) was published in final form. We disagree on both accounts.

Prior to the enactment of the Education for All Handicapped Children Act, the limitation against reimbursement for educational activities provided to individuals in an institution for the mentally retarded, contained in 42 CFR 441.13(b), could be read to have included any service provided to an institutionalized child which was provided by the State education agency. The Education for All Handicapped Children Act, however, set forth distinctions between the services provided by a state educational agency to handicapped children. Therefore, at the time that this statute was enacted, it was necessary to look at its requirements in order to interpret the limits of the exclusion contained in 42 CFR 441.13(b). In view of the distinctions between "special education" and "related services" in this Act, the Agency issued an action transmittal discussing the effect of the Act on Medicaid reimbursement, allowing reimbursement for certain educational support or "related" services under Medicaid. If anything, this interpretation of the regulation liberalized its effect. Therefore, we believe that our conclusion in *Oklahoma* was correct. The action transmittal, which interprets the Education for All Handicapped Children Act and its regulations and how it relates to the prohibition set forth in 42 CFR 441.13(b), makes a distinction under which "special education" is considered an "educational activity" within 42 CFR 441.13(b) and is therefore not reimbursable under Medicaid, but "related services" may be funded under Medicaid.

As we explained in *Oklahoma,* the federal education regulations which define "special education" and "related services" provide guidance as to whether an activity is within the scope of the Medicaid prohibition. Although the action transmittal contains language about providing flexibility to states in deciding what funding sources apply to certain activities, that language is used within the limited context of services which are reimbursable under Medicaid and also qualify as "related services" under the Education for All Handicapped Children Act and the regulations. It is within this very limited context that certain funding choices may be made. However, the action transmittal also states that even these limited choices may not exist where related services are provided by the State educational agency free of charge to all children as part of "special education." *See*, 45 CFR 121a.14(a)(2) now recodified as 34 CFR 300.14(a)(2).

We disagree with the State that state standards may not reasonably be used to determine the services included in "special education." The federal education regulations provide that a state, in providing a free appropriate public education, is free to choose to provide all, some, or no "related services" within the state's own definition of "special education." If it chooses to include some or all "related services" in its definition of "special education," then those services would be available free of charge to all children. The federal education regulation sets forth that if related services are considered part of "special education" under state standards then they will also be considered part of "special education" under federal standards. *See*, 34 CFR 300.14(a)(2). Therefore, after the enactment of the Education for All Handicapped Children Act, state standards provided a reasonable and appropriate vehicle for determining whether Medicaid may provide reimbursement for "related services."

e. Massachusetts state standards include "related services" within the definition of "special education."

Having determined that "related services," which otherwise may be reimbursable under Medicaid, are excluded from reimbursement if state standards include such services as part of a free appropriate public education, it is necessary to look at the Massachusetts law and regulations to determine whether its state education standards extended responsibility for "related services" to the state education agency as part of its definition of "special education."

State standards mandate the State Department of Education to pay for "related services" provided by BIS. The State regulations implementing the State special education laws, known as Chapter 766 regulations, promulgated by the State Department of Education, define at Section 122.0 "special education" as everything that is required to be provided to a child in need of special education pursuant to the IEP for such children. Strictly speaking, under this definition if a service is required to be provided to a child pursuant to its IEP then it must be considered special education and is not reimbursable under Medicaid. However, a further review of the State's education regulations indicates that the State, in section 503 of the education regulations, provides that the certain services as set forth in paragraphs 503.1(a) through 503.1(k) must be provided by each school committee for each child in need of special education, and pursuant to section 322.1, the IEP must indicate specifically which of the services are necessary for the child. The services described include a vocational education program including prevocational and vocational training programs, all services which the various categories of certified or approved special education teachers are professionally qualified to provide, nursing services, peripatology, occupational therapy, physical therapy, speech and language therapy,

limited social and psychological services, the services of physician in prescribing, or referring a child for physical and occupational therapy, and parent and child instruction to enable the parents to participate in educating their child. Because these "services" are included within the definition of "special education," they are not fundable by Medicaid. Therefore, even if the disallowance here included costs attributable to the provision of "related services," we conclude that because "related services" are included within the State's definition of "special education," the State could not receive reimbursement under Medicaid for these services.

IV. Whether the disallowance of specific items of BIS costs is supportable.

The State also made arguments relating to specific cost items of the disallowance taken.

a. Service delivery contracts.

The auditors determined that BIS costs included costs related to contracts issued by BIS in order to provide specific services required by Chapter 766 regulations but which could not be met through existing State personnel. The auditors found that in FY 1979, the cost year on which the 1981 reimbursement rates were based, the recipients of such contracts were several educational "collaboratives," which are defined in Chapter 766 regulations at section 104 as school committees joined under written agreement to satisfy any of the requirements of Chapter 766 regulations, and one regional vocational school.

Clearly, as set forth in the State's Chapter 766 regulations at section 503, a vocational education program is considered part of the delivery of a special education program and would be included, where appropriate, in the child's IEP.

Therefore, the BIS costs for the contract with the vocational school are not reimbursable under our analysis. Furthermore, the prohibition contained in 42 CFR 441.13(b), independently of the restriction for educational activities, prohibits reimbursement for vocational training. Therefore, based on these two factors, we conclude the BIS costs related to the contract with the vocational school were properly disallowed.

As to BIS costs related to contracts with educational collaboratives, we conclude that these costs also were properly disallowed. School committees under Massachusetts State law and regulations are ultimately responsible for the provision of special education programs for school age children residing in its area. *See*, Massachusetts Laws Annotated, Chapter 71B, section 3 and Chapter 766 regulations, section 202. Under the Chapter 766 regulations at section 201.1(b), school committees have the option of entering into a written agreement or contract to satisfy the requirements of the regulations through a collaborative approved by the State Department of Education. The State, here, has not provided any evidence or testimony indicating that the type of services provided by these collaboratives were services other than those required by the Chapter 766 regulations. Since under State regulation, the purpose of the collaborative was to deliver special education services as mandated by law and regulation, we conclude that under our analysis above, the costs were not reimbursable by Medicaid.

b. Evaluative and managerial personnel contracts.

The auditors also determined that BIS costs included cos elated to contracts for personnel to evaluate and monitor functions required by Chapter 766 regulations. Contracts were issued for Evaluation Team Liaisons (ETL) and Program Manager Projects (PM) services.

ETL refers to personnel who, in response to Chapter 766 requirements, participate in annual reviews, develop educational programs, and coordinate communication between the variety of agencies delivering services to BIS children. Many of these contracts were performed by educational collaboratives. The PM contract was for a PM team to monitor BIS service delivery contracts and ETL activities.

Both of these types of contracts were for the purpose of evaluating and monitoring the services required to be provided by Chapter 766 and were inextricably related to the provision of special educational services. Therefore, under our analysis above, we conclude that these costs were not reimbursable under Medicaid.

c. State-salaried personnel of the Department of Education, including, institution school teachers and aides who conducted school programs in the ICFs/MR.

The State claimed that the costs for these personnel were part of the provision of an active treatment program. As we have determined above, the active treatment requirement does not extend to reimbursement for a special education program, and the State has not demonstrated that the services provided by BIS should not be considered special education. Moreover, the Agency here did not disallow any costs incurred for potentially "related services" performed by DMH staff. The disallowance related only to costs incurred by BIS for the State-salaried personnel involved in providing the special education program services.

Our conclusion is fully supported by the evidence. For example, an IEP is required by federal and State education law. BIS is obligated to provide services to those individuals 21 years old or under, as also required by federal and State education laws, whereas Medicaid services to an individual residing in an ICF/MR must be provided regardless of age. In addition, the testimony presented

characterized the BIS program as an "educational program," provided by "educational staff." Transcript, Vol. II, p. 182. Furthermore, testimony of the Assistant Superintendent of Education at the Belchertown State School indicated that she as well as BIS employees at the school are employees of the State Department of Education, that her educational background and professional experience is in teaching and education, and that her responsibilities are to ensure that special education services are provided to eligible (meaning children 21 years old or under) residents of the ICF/MR. Transcript, pp. 104-105, p. 158. The fact that the development of the IEP and ISP, which is required by Title XIX, are prepared jointly between the Department of Education and the Department of Mental Health, would not alter our conclusion. As testimony indicated, although developed jointly, the IEP is prepared by Department of Education staff, and as the State's brief indicated, the plans are developed jointly to avoid duplication of effort. Transcript, p. 107, and Appellant's Brief, p. 43. Therefore, we conclude that the costs disallowed for BIS personnel were for the costs of providing a special education program and are unallowable.

V. Collateral Arguments

a. Whether section 1902(a)(25) of the Social Security Act is a basis for state liability for the costs disallowed.

The Audit Report at page 9 stated that the authority for the statement in the action transmittal, that Medicaid cannot pay for specific health services if a state statute extends responsibility to the education agency, was the third party liability section contained in section 1905(a)(25) [*sic*] of the Act. The State argued in its brief that the State Department of Education could not be a liable third party within the meaning of this section. We need not reach that issue

here. As we explained in depth above, "special education" is considered an "educational activity" under 42 CFR 441.13(b). We also determined that if state standards include related services under its definition of special education, than those services are also considered an educational activity within 42 CFR 441.13(b). We determined here that under Massachusetts State standards, related services are included under the definition of "special education" and therefore, are not reimbursable under Medicaid because of the limitation in 42 CFR 441.13(b).

b. Whether the Developmentally Disabled Assistance and Bill of Rights Act impacts on this disallowance.

The State has argued that in determining what services are included in the active treatment concept, the Board should consider the provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000. The State points to the definition of the term "services for persons with developmental disabilities" at 42 U.S.C. 6001(8), which states that such term includes, among other things, education. The State pointed to this reference and concluded that since this Act related to rights of the mentally retarded for certain services, BIS services therefore should be reimbursable. The State also cited the Supreme Court decision in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) as support for the position that the Developmentally Disabled Assistance Act and Medicaid were part of a package of laws to improve the way in which this nation treats the mentally retarded.

In our view, the provisions of the Developmentally Disabled Act are not directly applicable to this dispute. This Act established a federal-state grant program whereby the federal government would provide assistance to states to aid them in creating programs to treat the mentally retarded. The Act is separate and distinct from the

Medicaid Program. Furthermore, the reference to *education* in 42 U.S.C. 6001(8) merely parallels a later provision of the Act, section 6063(b)(2), which recognizes that services are being provided by states under other federally assisted programs including education for the handicapped, vocational rehabilitation, public assistance, medical assistance, and other acts, to name a few. The Act in no way provides that educational services should be considered fundable by Medicaid.

The State's reference to the Court's statement in *Pennhurst* at page 1547 that "Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded" and to the Court's citation of those acts in footnote 25 at page 1547 adds little or no support for its argument that educational services are reimbursable by Medicaid. The State failed to recognize that among the Acts besides Medicaid cited by the Court was the Education for All Handicapped Children Act of 1975. Therefore, we do not find the State's citation to *Pennhurst* persuasive.

c. Whether the regulation at 42 CFR 441.13(b) is an interpretive rule, and if so, whether the regulations at 42 CFR 442, Subpart G, and 42 CFR 435.1009 take precedence over 42 CFR 441.13(b).

The State argued that when Congress amended Title XIX of the Social Security Act to include intermediate care facility services for the mentally retarded, it authorized the Secretary to set standards relating to services provided in an ICF/MR. Section 1905(d)(1) of the Act. The State pointed out that pursuant to this authority, the Secretary promulgated the regulations at 42 CFR 442, Subpart G. The State argued that Congress contemplated that any such regulations would be "legislative rules" because they would be the product of an exercise of delegated legislative power to make law through rules.

The State argued, citing provisions of Kenneth Culp Davis' *Administrative Law Treatise*, Chapter 7, section 8 (supp. 1982), that in contrast, the regulation at 42 CFR 441.13(b) is an interpretive rule because it was issued without delegated legislative power to make law through rules. The State asserted that the court in *Connecticut, supra,* recognized the distinction between legislative and interpretive rules, when it decided that courts, better than agencies, can determine the broad purpose behind a statute. The State, therefore, concluded that because section 441.13(b) is an interpretive rule, when there is a conflict it must fall before the legislative regulation set forth in 42 CFR 442, Subpart G which describes the standards for services required to be provided in an ICF/MR and 42 CFR 435.1009, which defines active treatment. The State implied that if the prohibition against reimbursement under Medicaid was no longer effective, then the costs in question could be reimbursable under Medicaid as training and habilitation services.

Contrary to the State's assertions, 42 CFR 441.13(b) was issued pursuant to delegated power to make rules. The Social Security Act, of which Title XIX is a part, at section 1102 authorizes the Secretary of Health and Human Services to "make and publish such rules and regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under the Act." The Secretary issued the regulation at 42 CFR 441.13(b) pursuant to his delegated authority in section 1102 of the Act. The State has acknowledged in its post-hearing brief at page 3 that the regulation was properly promulgated. Also, the *Connecticut* decision can be distinguished from the instant dispute, in that, the court, in substituting its judgment for the Agency's there, determined that the regulation was not consistent with the statute and legislative history. We have determined here that the regulation is consistent with

the statute and legislative intent, as well as finding that this regulation does not conflict with 42 CFR 442, Subpart G and 42 CFR 435.1009.

VI. The Plan Compliance/Disallowance Issue

In its notice of appeal, the State challenged the Board's jurisdiction to act in this matter, contending that a plan compliance hearing was required pursuant to section 1904 of the Act and the regulations at 45 CFR Part 201. The Board Chair reserved accepting jurisdiction over the dispute until the parties had an opportunity to further brief the issue. The State devoted a substantial portion of its brief to the issue. For reasons stated below, we conclude that the Board does have jurisdiction over this matter. In New Jersey Department of Human Services, Decision No. 259, February 25, 1982, the Board discussed the relevant statutory and regulatory provisions, as well as court decisions on the issue. That discussion will not be repeated here except as necessary to indicate why we disagree with the State's analysis and how subsequent court decisions have view the issue.

Compliance procedures apply only when the Secretary finds *substantial* noncompliance in the administration of the state plan sufficient to justify invoking the potential sanction of denying all future federal funding from the State's program. The sweeping nature of this sanction is also the reason for allowing a state, after it has exhausted its administrative appeal remedies set forth at 45 CFR Part 213, to seek review of a final determination of noncompliance directly in the Court of Appeals. In general, however, a disallowance represents an isolated and highly focused inquiry into a State's operation of the assistance program. It is a finding that specific expenditures claimed by the state for a discrete time period are unallowable. The disallowance determination that improper expenditures

were claimed by a state is retrospective in impact. No prospective sanctions are imposed as a result of a disallowance determination. As we stated in *New Jersey*, noncompliance issues and disallowance issues are not mutually exclusive, so that the same set of facts conceivably could call for either of the procedures. Therefore, the Secretary might determine that a particular set of circumstances requires only a "disallowance" when, arguably, a finding of noncompliance would also have been possible. For example, a particular state action or policy may not constitute *substantial* noncompliance with federal requirements requiring the severe sanction of denial of all future funding, but may nevertheless merit a disallowance of federal funds.

The State argued that the Secretary would always prefer a disallowance action rather than compliance proceedings, because it enables the Secretary to impose a retrospective denial of funds and maximizes the Secretary's chance of a favorable outcome "because the Secretary may not sanction a state prospectively for the manner in which it administers its program unless there is substantial noncompliance with its plan." State's Brief, p. 21. The State further argued that the disallowance here did not contest specific individual items or a class of items but implicated the administration of the program as a whole and that the entire public ICF/MR program is affected by this disallowance inasmuch as reimbursement for habilitative services as part of an active treatment program in Massachusetts' public ICFs/MR is disallowed. State's Brief, p. 18.

There has been no finding of substantial noncompliance in the administration of the State plan by the Secretary here and we have not been persuaded that a finding of substantial noncompliance would be justified. We conclude that the disallowance does not implicate the administration of the State's medical assistance program as a whole. It, in fact, relates to a specific identified class of

unallowable costs related to a specific time period and represents a proportionally small amount of the State's total Medicaid expenditures.

Furthermore, as we have noted above, the only costs identified as unallowable were the costs attributable to BIS provision of educational services. The Agency indicated that the cost of services provided by DMH staff, which included reimbursable habilitative services, was paid by Medicaid. Therefore, contrary to the State's assertion, the Agency did not determine that all services potentially cognizable as "habilitative" were unallowable, but, instead, stated that only services provided by BIS are unallowable because the costs relate to "special educational" activities provided by BIS under State education statutes and regulations. The issue does not involve the broader question that the ultimate beneficiaries are being deprived of required Medicaid services. The disallowance denied reimbursement for cost of activities included by the State in its Medicaid per diem rates which are outside the scope of the Medicaid program. Therefore, we do not find this dispute involves substantial noncompliance.

The State has also asserted that the present dispute is distinguishable from the *New Jersey* decision. The State argued that in *New Jersey* the question of whether a compliance hearing was required was rendered moot by New Jersey subsequently coming into compliance. The State here argued that the issue is not moot. We disagree with the State that this is a critical distinction.

The question of whether a compliance hearing is necessary is determined in the first instance by whether the alleged noncompliance is substantial. Moreover, the compliance procedures and the disallowance procedures are not mutually exclusive. The fact that a State may later come into compliance would not necessarily preclude the

Agency from disallowing for previously claimed unallowable costs. The State argued that the Secretary must choose between the procedures implying that the Secretary may either impose a prospective sanction or a retrospective sanction. This argument assumes that if the Secretary finds substantial noncompliance and initiates compliance proceedings, that the Secretary may not take a disallowance action to recover unallowable costs previously claimed by the State under Medicaid. The argument effectively ignores section 1903(d)(2) of the Act which allows the Secretary to reduce the amount paid to a state for Medicaid to the extent of any overpayment the Secretary determines was made to a state. [NOTE: The Federal Government's authority to recover misspent funds by means of a disallowance pursuant to an overpayment provision was just affirmed by the Supreme Court in *Bell v. New Jersey and Pennsylvania,* 51 U.S.L.W. 4647 (May 31, 1983).]

Furthermore, the State mistakenly relied on several statements taken from court decisions or legislative history. Although a few courts have distinguished compliance issues from "clerical mistakes," we do not think that disallowance procedures are appropriate only where a State is alleged to have made a computational or similar error in claiming FFP. The relevant legislative history refers to "audit exceptions." The basis for an audit exception is often the failure to comply with a federal requirement. The compliance procedures do not have to be invoked in any case involving significant legal questions.[4] Such ques-

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[4] Section 1904 of the Act sets forth the criteria for compliance proceedings as when the Secretary finds "(1) that the plan has been so changed that it no longer complies with the provisions of section 1902; of (2) that in the administration of the plan there is a failure to comply substantially *with any such provision.*" (Emphasis added.)

The U.S. Court of Appeals for the First Circuit, in its decision in *Commonwealth of Massachusetts v. Departmental Grant Appeals*

tions can arise from disallowances based on audits or similar reviews even though there are only discrete items of cost in dispute and no finding of substantial noncompliance by a state in administering its program.

The State's reliance on its diligence in claiming that the dispute here is a compliance dispute is also misplaced. Although court decisions indicate that failure to raise the issue may contribute to a court finding that a disallowance is involved, nothing in the court decisions indicates that a state's diligence in insisting that a compliance dispute is involved is sufficient.

Finally, comity and equity do not require a compliance hearing here. Appeal Brief, pp. 25-26. The State relied for this argument on a statement (made by Senator Javits on the Senate floor) which relates to the need for hearings and judicial review to avoid disruption in an existing state plan. *See*, 116 Cong. Rec. 3068 (1965). This refers to provisions for review of denial of approval of state plan amendments and was used by the court in the case of *State Department of Public Works of the State of Texas v. Califano*, 556 F.2d 326, 332 (5th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978), as support for its view that that dispute was over plan conformity. There is no question here about the State's plan conforming to applicable requirements. Moreover, the *Texas* Court's statement that the compliance-type hearing put a state on a "more equal

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Board, 698 F.2d 22 (1st Cir. 1983) indicated that if the language, "any such provision" in section 1904 of the Act is read as meaning any provision of federal law, the result would be that (1) every refusal of FFP becomes a determination of noncompliance, that (2) the idea of a disallowance is read out of the statute, and that (3) the "any such provision" language becomes meaningless. The Court stated that "[s]imply accepting that there is a dispute about some sort of federal requirement cannot suffice to make this a compliance question." *Supra*, at pp. 28 and 29.

basis" than a disallowance reconsideration was premised in part on the Court's view that the latter procedures were "summary."

The Board's procedures for reconsidering disallowances provide substantially the same protections as the compliance procedures.[5]

Moreover, the U.S. Court of Appeals for the Seventh Circuit decided in *State of Illinois v. Schweiker*, Nos. 82-1175 and 82-1752 (7th Cir. May 6, 1983), that the problem with the functional approach to interpreting whether a dispute is properly a compliance proceeding used by the other courts, including the Third Circuit, is that it is complicated and uncertain in application. The court indicated that a jurisdictional test should be clear in order to allow a litigant to know in which court he belongs. Therefore, the court determined that clearest way of deciding the jurisdictional issue in these disputes is to take a literal approach. Under this approach, the court determined that if the Secretary processes a matter as a disallowance matter, then it will be treated as such and the Court of Appeals will not have jurisdiction.

Accordingly, we conclude that this dispute is a disallowance action over which this Board has jurisdiction.

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[5] The U.S. Court of Appeals for the Third Circuit, in its decision in *State of New Jersey v. Department of Health and Human Services*, 670 F.2d 1284 (3rd Cir. 1981), indicated that the Board's action there was an "opportunity for a hearing" sufficient to satisfy statutory requirements for compliance proceedings. At note 13.

Conclusion

For the reasons stated above, we uphold the entire disallowance of BIS costs for educational activities.[6]

Cecilia Sparks Ford

Norval D. (John) Settle

Donald F. Garrett
Presiding Board Member

[6] The State requested the Board to issue certain rulings in its favor concerning issues in this case. Based on our decision here, we need not specifically rule on the requests because they go to the substantive issues which we have decided above. *See,* Appellant's Request for Rulings.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1109

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT.

Entered: March 31, 1987

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part and the cause is remanded to the district court for further action consistent with the opinion filed this day.

Each party to bear its own costs.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Francis P. Scigliano, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1118

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,
PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT.

Entered: March 31, 1987

JUDGMENT

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Each party to bear its own costs.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Francis P. Scigliano, Clerk.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1109

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,
APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT,
APPELLANT.

No. 86-1118

COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF
PUBLIC WELFARE, PLAINTIFF, APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT,
APPELLANT.

Entered: June 2, 1987

ORDER OF COURT

Before: CAMPBELL, *Chief Judge,* COFFIN, BOWNES, BREYER, TORRUELLA and SELYA, *Circuit Judges.*

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and

the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and suggestion for rehearing en banc be denied.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Francis P. Scigliano, Clerk.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS,
BY ITS DEPARTMENT OF PUBLIC WELFARE,
PLAINTIFF,

v.

MARGARET HECKLER, AS SHE IS SECRETARY OF
THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

CAROLYN DAVIS, AS SHE IS ADMINISTRATOR OF
THE HEALTH CARE FINANCING ADMINISTRATION OF
THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

AND

NORVAL D. SETTLE, JUDITH A. BALLARD,
AND DONALD F. GARRETT, AS THEY CONSTITUTE THE
DEPARTMENTAL GRANT APPEALS BOARD OF THE
DEPARTMENT OF HEALTH & HUMAN SERVICES, DEFENDANTS.

INTRODUCTION

1. By this complaint, the plaintiff Commonwealth of Massachusetts (the Commonwealth), seeks judicial review of a final decision of the Departmental Grant Appeals Board of the Department of Health and Human Services (the Board), which sustained the Health Care Financing Administration's (HCFA) disallowance of $4,908,994 in

federal financial participation due to the Commonwealth under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* This action also seeks declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702 and 703, and 28 U.S.C. § 2201, to determine the rights and obligations of the Commonwealth under the Medicaid program and to prevent the wrongful withholding of federal reimbursement.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331. No special statutory form of proceeding is provided for review of the decision of the Board. This Court has venue by virtue of 28 U.S.C. § 1391(e). The United States has waived its immunity by 5 U.S.C. § 702.

RELATED CASE

3. The facts and legal issues presented by this case are in all material respects similar to those presented in *Commonwealth of Massachusetts* v. *Heckler, et al.*, U.S.D.C. Civil Action No. 83-2523-G (D. Mass.). In that case, the Commonwealth challenges HCFA's disallowance of $6,414,964 in reimbursement for services provided at ICF/MRs during an earlier period, July 1, 1978, through December 31, 1980. The disallowances at issue here and in Civil Action No. 83-2523-G purportedly rest on the same legal ground. The cases are therefore "related" for purposes of U.S. Dist. Ct. Local Rule 8(e).

PARTIES

4. The Commonwealth is a sovereign State of the United States. The Department of Public Welfare (DPW) is a department of the Commonwealth organized pursuant

to Chapter 18 of the Massachusetts General Laws. The Commonwealth, by DPW, is a party aggrieved by the final decision of the Board.

5. Margaret Heckler is the Secretary of the United States Department of Health and Human Services (the Secretary).

6. Carolyn Davis is the Administrator of the Health Care Financing Administration of the Department of Health and Human Services.

7. Norval D. Settle, Judith A. Ballard, and Donald F. Garrett are members of the panel of the Board which rendered the final decision appealed herein.

FACTUAL ALLEGATIONS

8. The Medicaid Assistance Program (Medicaid) is a joint state and federal program authorized by and operated pursuant to Title XIX of the Social Security Act of 1935, as amended (42 U.S.C. §§ 1396 *et seq.*,), in which participating states share with the federal government the cost of financing a program administered by the states for the benefit of certain persons needing medical care and services.

9. The Commonwealth participates in the Medicaid program pursuant to Mass. Gen. Laws ch. 118E. Pursuant to 42 U.S.C. § 1396a, the Commonwealth operates its program in accordance with a state plan for medical assistance which has been approved by the Secretary. DPW is the "single state agency" responsible for administering the state plan for Massachusetts.

10. The Secretary, through HCFA, administers the Medicaid program for the federal government pursuant to 42 U.S.C. §§ 1396 *et seq.*, and 42 U.S.C. §§ 1301 *et seq.*

11. The amount the federal government reimburses the state for expenditures under the Medicaid program is the "federal financial participation" (FFP). The

Commonwealth receives FFP at the rate of approximately fifty (50) percent of the total amount expended under its plan for medical assistance.

12. On August 20, 1984, HCFA informed DPW that, based on its audit of services provided to residents of Massachusetts ICF/MRs during the period January 1, 1981, through June 30, 1982, HCFA intended to disallow $4,908,994 in FFP.

13. According to the Board, the disallowance was based on Medicaid "program regulations" which "preclude reimbursement since they expressly bar payment for vocational training and educational activities for individuals in ICF/MRs. 42 C.F.R. 441.13(b)." Board Decision No. 638, March 29, 1985, at 1 (copy attached hereto).

14. In Decision No. 638, dated March 29, 1985, the Board upheld the disallowance of the $4,908,994 in FFP. Decision No. 638 is the final decision of the Secretary in this matter.

STATEMENT OF CLAIMS

15. The decision of the Board should be reversed because it is:

A. based upon errors of law, including without limitation an erroneous interpretation and application of 42 U.S.C. §§ 1396d(c) and 1396d(d);

B. arbitrary, capricious, and an abuse of discretion in that it denies reimbursement for services mandated by federal law;

C. arbitrary and capricious in that it denies reimbursement for services previously held by the Secretary to be reimbursable under the Medicaid program;

D. in excess of statutory authority in that it is based upon an application of 42 C.F.R. § 441.13(b) inconsistent with 42 U.S.C. §§ 1396d(c) and 1396d(d);

E. unsupported by substantial evidence in that the record reasonably permitted no conclusion other than that the services provided to residents at Massachusetts ICF/MRs and in question here were habilitative services mandated by and reimbursable under the Medicaid program.

16. The errors set forth above materially prejudice the rights of plaintiff Commonwealth of Massachusetts, DPW.

REQUESTS FOR RELIEF

WHEREFORE, the plaintiff requests that this Court grant the following relief:

1. Enjoin the Secretary and HCFA from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question.

2. Set aside the Board's Decision No. 638.

3. Grant such declaratory and other relief as the Court deems just.

COMMONWEALTH OF MASSACHUSETTS
By its attorneys,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/ THOMAS A. BARNICO

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Date: June 5, 1985

APPENDIX L

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, BY ITS DEPARTMENT OF PUBLIC WELFARE, PLAINTIFF,

v.

MARGARET HECKLER, AS SHE IS SECRETARY OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

CAROLYNE DAVIS, AS SHE IS ADMINISTRATOR OF THE HEALTH CARE FINANCING ADMINISTRATION OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

AND

NORVAL D. SETTLE, CECELIA SPARKS FORD, AND DONALD F. GARRETT, AS THEY CONSTITUTE THE DEPARTMENTAL GRANT APPEALS BOARD OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES, DEFENDANTS.

COMPLAINT

INTRODUCTION

1. By this complaint, the plaintiff seeks judicial review of a final decision of the Departmental Grant Appeals Board of the Department of Health and Human Services (hereafter "the Board"), which sustained the Health Care Financing Administration's (hereinafter "HCFA") disallowance of $6,414,964 in federal financial partici-

pation due to the Commonwealth of Massachusetts under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. §§1396 *et seq.* This action also seeks declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702, 703, and 28 U.S.C. § 2201 to determine the rights and obligations of the Commonwealth under the Medicaid program and to prevent the wrongful withholding of federal reimbursement funds.

Jurisdiction

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C § 1331. No special statutory form of proceeding is provided for review of the decision of the Board. This Court has venue by virtue of 28 U.S.C. § 1391(e). The United States has waived its immunity by 5 U.S.C. § 702.

Parties

3. The Commonwealth of Massachusetts (hereinafter "the Commonwealth") is a sovereign State of the United States. The Department of Public Welfare (hereinafter "DPW") is a department of the Commonwealth organized pursuant to chapter 18 of the Massachusetts General Laws. The Commonwealth, by the DPW, is a party aggrieved by a decision of the Board.

4. Margaret Heckler is the Secretary of the United States Department of Health and Human Services (hereinafter "the Secretary").

5. Carolyne [*sic*] Davis is the Administrator of the Health Care Financing Administration of the Department of Health and Human Services.

6. Norval D. Settle, Cecilia Sparks Ford, and Donald F. Garrett are members of the panel of the Board which rendered the decision of which the Commonwealth seeks review.

Factual Allegations

7. The Medical Assistance Program (Medicaid) is a joint state and federal program authorized by and operated pursuant to Title XIX of the Social Security Act of 1935, as amended (42 U.S.C. §§ 1396 *et seq.*), in which participating states share with the federal government the cost of financing a program administered by the states for the benefit of certain persons needing medical care and services.

8. The Commonwealth participates in the Medicaid program pursuant to G.L. c. 118E. Pursuant to 42 U.S.C. § 1396a, the Commonwealth operates its program in accordance with a state plan for medical assistance which has been approved by the Secretary. DPW is the "single state agency" responsible for administering the state plan for Massachusetts.

9. The Secretary, through HCFA, administers the Medicaid program for the federal government pursuant to 42 U.S.C. §§ 1396 *et seq.* and 42 U.S.C. §§ 1301 *et seq.*

10. The amount the federal government reimburses the state for expenditures under the Medicaid program is the "federal financial participation" (hereinafter "FFP"). The Commonwealth receives FFP at the rate of approximately fifty (50) percent of the total amount expended under its plan for medical assistance.

11. On March 5, 1982, the Regional Audit Director of HHS submitted to DPW a report entitled "Review of Medicaid Payments to State-Owned Intermediate Care Facilities for the Mentally Retarded as Administered by the Massachusetts Department of Public Welfare." The audit report covered the period from July 1, 1978 to December 31, 1980.

12. By a letter dated August 23, 1982, the Regional Administrator of HCFA notified the DPW that after review of the audit he had determined to disallow $6,414,964 in FFP.

13. According to the Board, the bases for the disallowance were "that (1) the State had incorrectly claimed reimbursement for the cost of vocational training and educational activities provided to residents of intermediate care facilities for the mentally retarded and (2) those activities are available free of charge to all children under Massachusetts State law." Board Decision at 1.

14. In Decision No. 438, dated May 31, 1983, the Board upheld the disallowance of $6,414,964 in FFP. A copy of Decision No. 438 is attached hereto. Decision No. 438 is the final decision of the Secretary in this matter.

Statement of Claims

15. The decision of the Board should be reversed because it is:

A. Based upon errors of law.
B. Arbitrary, capricious, and an abuse of discretion.
C. In excess of statutory jurisdiction and authority.
D. Based upon improperly promulgated regulations.
E. Unsupported by substantial evidence.

16. The errors set forth above materially prejudice the rights of plaintiff DPW.

Requests for Relief

Wherefore, the plaintiff requests that this Court grant the following relief:

1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth or from recovering from the Commonwealth the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.

2. Set aside the Board's Decision No. 438.

3. Grant such declaratory and other relief as the Court deems just.

By its attorneys,
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ATTORNEY GENERAL

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Dated: August 26, 1983

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